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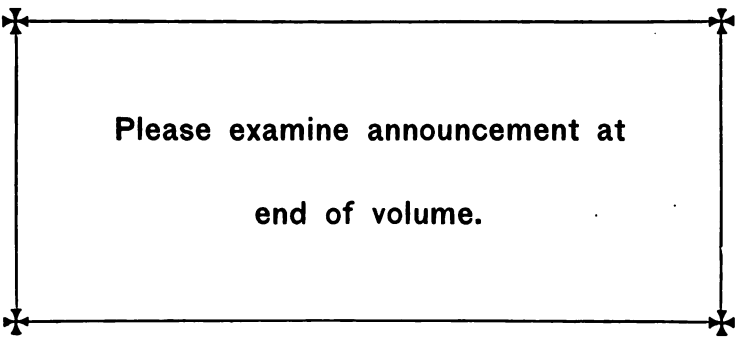
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**ON**

**THE LAW OF TRUSTS.**

**BY**  
**(THE LATE)**  
**THOMAS LEWIN, ESQ.**

**Eighth Edition**

**BY**  
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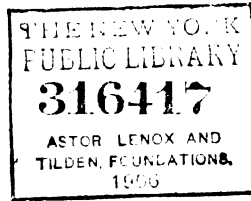
***FIRST AMERICAN, FROM THE EIGHTH ENGLISH, EDITION***

**BY**  
**JAMES H. FLINT.**

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OF ALLOWANCES TO TRUSTEES.

Now that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon subjects very closely interwoven with the execution of the office,<sup>1</sup> viz.: First, Allowances to trustees for their *time and trouble*; and, Secondly, Allowances to trustees for *actual expenses*.

SECTION I.

ALLOWANCES FOR TIME AND TROUBLE.

1. **General rule.**—It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time. One reason given is, that on these pretences, if admitted, the trust estate might be loaded and rendered of little value; besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not (*a*). The true ground, however, is,

(*a*) *Robinson v. Pett*, 3 P. W. 251, per Lord Talbot; *Gould v. Fleetwood*, cited *Ib.* note (A); *How v. Godfrey*, Rep. t. Finch, 361; *Brocksopp v. Barnes*, 5 Mad. 90; *Ayliffe v. Murray*, 2 Atk. 58; *Re Ormsby*, 1 B. & B. 189, per Lord Manners; *Charity Corporation v. Sutton*, 2 Atk. 406, per Lord Hardwicke; *Borithon v. Hockmore*, 1 Vern. 316, &c.

<sup>1</sup> *Allowance to trustees.*—Nearly all the states have statutory provisions regulating the allowances and compensation to which one holding a fiduciary relation may be entitled, to which reference should be had. See also note on compensation of trustees, *ante* page 386.

If a trustee is negligent, dishonest, or otherwise unfaithful, nothing will be allowed him; *Hermstead's App.* 60 Pa. St. 423; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *Gordon v. Matthews*, 30 Md. 235; as where he neglects to invest trust funds; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Lathrop v. Smalley*, 23 N. J. Eq. 192; or uses trust funds himself; *Norris's App.* 71 Pa. St. 106; but see *Parker's Est.*, 64 Pa. St. 307; or where he fails to keep proper accounts;

that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty; and, as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position (*b*).

[\*628] \*2. **Executors, mortgagees, receivers, committees of lunatics.** — And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators (*a*), mortgagees (*b*), receivers (*c*), committees of lunatics' estates (*d*), a surviving partner (*e*), &c.

(*b*) *New v. Jones*, Exch. Aug. 9, 1833, cited 9th Jarm. Prec. 338, *per* Lord Lyndhurst; and see *Burton v. Wookey*, 6 Mad. 308.

(*a*) *Scattergood v. Harrison*, Mos. 128; *How v. Godfrey*, Rep. t. Finch, 361; *Sheriff v. Axe*, 4 Russ. 33.

(*b*) *Bonithon v. Hockmore*, 1 Vern. 316; *Langstaffe v. Fenwick*, 10 Ves. 405; *French v. Baron*, 2 Atk. 120; *Carew v. Johnston*, 2 Sch. & Lef. 301; *Arnold v. Garner*, 2 Ph. 231; *Matthi-*

*son v. Clarke*, 3 Drew. 3; *Barrett v. Hartley*, 12 Jur. N. S. 426. Mortgages were also disabled formerly by the effect of the usury laws from claiming anything beyond their principal and legal interest.

(*c*) *Re Ormsby*, 1 B. & B. 189.

(*d*) *Anon. case*, 10 Ves. 103; *Re Walker*, 2 Ph. 630; *Re Westbrooke*, Ib. 631.

(*e*) *Burden v. Burden*, 1 V. & B. 170; *Stocken v. Dawson*, 6 Beav. 371.

*Marcy's Ac't*, 24 N. J. Eq. 451; *Kenan v. Hall*, 8 Ga. 417; but see *Finch v. Ragland*, 2 Dev. Eq. 137; *Gee v. Hicks*, Rich. Eq. Cas. 5; mistake of judgment by trustee will not cut off his compensation; *Myers' App.* 62 Pa. St. 104. A trustee may waive all compensation and allowance; *Vestry v. Barksdale*, 1 Strob. Eq. 197; *Haglar v. McCombs*, 66 N. C. 345; if the allowance is fixed in the declaration of trust the trustee is bound by it; *College v. Willingham*, 13 Rich. Eq. 195; or if it is mutually agreed upon; *Jackson v. Jackson*, 3 N. J. Eq. 113. A trustee cannot receive a double allowance; *Blake v. Pegram*, 101 Mass. 592.

A trustee will always be allowed his expenses and he will have a lien on the trust estate until he has been reimbursed; and this is true whether it is mentioned in the instrument declaring the trust or not; *Morton v. Barrett*, 22 Me. 257; *R. & S. R. R. Co. v. Miller*, 47 Vt. 146; *Jones v. Dawson*, 19 Ala. 672; *Low v. Morris*, 13 Ga. 165. A trustee will be allowed his travelling expenses; *Towle v. Mack*, 2 Vt. 19; *Burr v. M'Ewen*, Bald. C. C. 154; also for all legal advice which it may be necessary for him to have; *Brady v. Dilleys*, 27 Md. 570; *Wilson's App.* 41 Pa. St. 94; *Beatty v. Clark*, 20 Cal. 11; and the subsequent avoidance of the trust is immaterial; *Hawley v. James*, 16 Wend. 61; *Stewart v. M'Minn*, 5 W. & S. 100. Unless a trustee keeps an accurate account of his disbursements the smallest possible sum will be allowed him; *Green v. Winter*, 1 Johns. Ch. 27; *M'Dowell v. Caldwell*, 2 M'Cord, Ch. 43; or none at all; *Wistar's App.* 54 Pa. St. 60; *Miller v. Whittier*, 36 Me. 577. A trustee may be allowed the expense of necessary assistance, such as clerks, agents, and the like; *Kennedy's App.* 4 Barr. 150; *Wade v.*

3. **Trustees of West India estates.**—But trustees for absentees of estates in the *West Indies* are allowed a commission for their personal care in the management and improvement of the property. However, if, instead of remaining upon the island they commit the management to the hands of agents, the Court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon his reward when he had been absent himself (*f*). But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper (*g*).

**Rate of commission in Jamaica.**—The rate of commission in *Jamaica* has been regulated by several Acts of Assembly; it was originally 10*l.* per cent. upon the receipts, then 8*l.* per cent., and since 6*l.* per cent. (*h*). But the intention of the Legislature was only that the rate should not exceed 6*l.* per cent. not that under particular circumstances it might not be a great deal less (*i*).

**Mortgagees in possession of West India estates.**—*Mortgagees in possession* of estates in *Jamaica* are, by the Act referred to, expressly prohibited from charging any commission, except what they may have themselves paid by way of commission to a factor (*j*); and without regard to statutory prohibition, mortgagees in possession of West Indian prop-

(*f*) *Chambers v. Goldwin*, 9 Ves.  
273.

(*i*) See S. C. Id. 257.

(*g*) *Forrest v. Elwes*, 2 Mer. 68.

268.

(*h*) *Chambers v. Goldwin*, 9 Ves.  
267.

(*j*) See S. C. 5 Ves. 837; 9 Ves.

Pope, 44 Ala. 690. Expenses incurred where contrary to the wishes of the *cestui que trust* may be refused; *Berryhill's App.* 35 Pa. St. 245. If while a trustee is in the exercise of due care, any portion of the trust estate is lost or stolen, the loss will fall upon the estate; *Campbell v. Miller*, 38 Ga. 304; *Neff's App.* 57 Pa. St. 91; *Bryant v. Russell*, 23 Pick. 546; and the same is true of investments; *Neilson v. Cook*, 40 Ala. 498. Trustees may pay any disbursements which a Court, upon application, would surely order; *King v. Cushman*, 41 Ill. 31; *Murray v. De Rottenham*, 6 Johns. Ch. 62. A trustee may pay any necessary additional expense from the estate, if any is required because of the insanity, infancy &c. of the *cestui que trust*; *Leonard v. Powell*, 41 Ga. 598.



erty are under the same disability of charging commission as if the property were situate in this country (*k*).

4. **Executor in the East Indies.**—An executor appointed in the *East Indies* and administering in that country, and then returning to England, is, if called upon in a Court of equity to render an account, allowed a commission [\*629] \*of 5 per cent. upon the receipts *or* payments, [where according to the practice of the Indian Courts a similar allowance would be made in India.] The appointment of an executor in the East Indies is considered the appointment of an agent for the management of the estate. Without such an allowance, where a person dies in India deprived of the presence of his relations, the effects of the testator might often not be collected at all. Besides, the executors in England could scarcely procure a person to undertake the office at any cheaper rate (*a*). If an Indian executor, after collecting part of the assets, comes over to this country, he is allowed a commission on those assets only that were collected by himself in India, and not on the

(*k*) *Leith v. Irvine*, 1 M. & K. 277; see *Chambers v. Davidson*, 1 L.R.P.C. 296.

(*a*) *Chetham v. Lord Audley*, 4 Ves. 72; *Matthews v. Bagshaw*, 14 Beav. 123. To the latter case is appended the following note:—

“The custom of allowing a commission to executors and administrators in the presidency of *Bengal* has been abolished by Act No. VII., of 1849, of the Governor-General in Council. By that Act an Administrator-General has been appointed in place of the Ecclesiastical Registrar, with a reduced commission of 3 per cent. on monies distributed or invested in manner therein provided.

“By Act No. II., of 1850, the provisions of the above Act, with certain restrictions, are extended to the presidencies of *Madras* and *Bombay*, but the rate of commission to the public administrator is there to remain 5 per cent. until altered to 3 per cent. by the Governor and Council in each of these presidencies.”

[By Act No. II., of 1874, sect. 56. No person other than the Administrator-General acting officially is to receive or retain any commission or agency charges, for anything done by the executor or administrator under any probate or letters of administration or letters *ad colligenda bona* which have been granted by the Supreme Court, or High Court at Fort William in Bengal, since the passing of the Act No. VII. of 1849, or by either of the Supreme or High Courts at Madras and Bombay, since the passing of the Act No. II. of 1850, or which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections 187 and 190 of The Indian Succession Act, 1865. But this enactment is not to prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise.]

assets subsequently collected by his agents and transmitted to this country, for the Courts here allow the commission because the Indian Courts allow it, and the Indian Courts allow it on the ground of residence in India (*b*).

**Where he has a legacy for his trouble.** — An executor in India is only allowed the commission where the testator himself has not left him a legacy for his trouble (*c*); but if the amount of the legacy be an inadequate compensation for the duties of the office, it seems the executor, so as he signify his resolution in proper time, may renounce the intended legacy, and take advantage of the commission (*d*).

**5. Constructive trustees.** — A person who has carried on a business with another man's money under circumstances which make him liable to account for \* profits, [\*630] will be allowed a compensation for his *skill and exertions* in the management of the concern (*a*).

**6. Express trustee has no allowance for management of a trade.** — But a person will not be permitted, except under very special circumstances (*b*), to charge anything for his management of a trade or business, where he has been clothed in *express* terms with the character of a trustee or executor (*c*).

**7. Solicitors.** — A *solicitor* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements (*d*). Lord Lyndhurst observed, "It would be *placing his INTEREST at variance with the duties he has to discharge*. It is said, the bill may be taxed, but that would not be a sufficient check: the estate has a right not only to the protection of the taxing

(*b*) *Campbell v. Campbell*, 13 Sim. 168; and see 2 Y. & C. C. C. 607.

(*c*) *Freeman v. Fairlie*, 3 Mer. 24.

(*d*) See *Id.* 28.

(*a*) *Brown v. De Tastet*, Jac. 284; and see Sir Samuel Romilly's argument in *Crawshay v. Collins*, 15 Ves. 225; and *Wedderburn v. Wedderburn*, 22 Beav. 84. To this principle must also be referred the decision in *Brown v. Litton*, 1 P. W. 140; 10 Mod. 20.

(*b*) *Forster v. Ridley*, 4 N. R. 417; S. C. 4 De G. J. & S. 452.

(*c*) *Stocken v. Dawson*, 6 Beav. 371; *Burden v. Burden*, 1 V. & B. 170; *Brocksope v. Barnes*, 5 Mad. 90. See *Marshall v. Holloway*, 2 Sw. 432.

(*d*) *New v. Jones*, Excheq. Aug. 9, 1833, 9 Jarm. Prec. 338. See the result of the various decisions stated at p. 281, *supra*.

officer, but also to the vigilance and guardianship of the executor or trustee: a trustee placed in the situation of a solicitor might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do, if he were to derive no emolument from them himself, and if he were to employ another person" (e).

8. *Settled accounts.*—If a *cestui que trust* settle accounts with a trustee, who is a solicitor, and execute a general release, and the accounts contain items of charges for professional services, the *cestui que trust*, if he had no legal advice, and was not expressly informed, that professional services might have been disallowed, may open the accounts as regards the objectionable items (f); but if the *cestui que trust* had independent legal assistance, he is bound by the release (g).

9. *Purchaser.*—The doctrine against professional charges by a trustee, who is a solicitor, is so rigidly applied, that where a security has been given for payment of such professional charges, it may be set aside, even as against a *purchaser for valuable consideration*, if he had notice (h).

10. *Allowance directed by the settlor.*—The rule [\*631] against allowances to trustees is merely a general \*one in the absence of express directions to the contrary; for there is no objection to the settlor himself *directing compensation* to the trustee for his services, either by the gift of a sum in gross, or by the allowance of a salary (a).

11. *Allowance does not cease on institution of a suit.*—And if a testator give an executor a salary for his trouble the allowance will not cease on the institution of a suit; for though the management be thenceforward under the direction of the Court, the executor is still called upon to assist the Court in the administration with his care and vigilance (b).

(e) *New v. Jones*, 9 Jarm. Prec. 338.

(f) *Todd v. Wilson*, 9 Beav. 486.

(g) *Stanes v. Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209.

(h) *Gomley v. Wood*, 3 Jon. & Lat. 678.

(a) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Robinson v. Pett*, 3 P. W. 250, per Sir J. Jekyll; *Willis v. Kibble*, 1 Beav. 559.

(b) *Baker v. Martin*, 8 Sim. 25; see ante, p. 598.

If the executor be wholly incapacitated, even by the act of God, from discharging the duties of executor (*c*), and *a fortiori* if the executor, being capable, do not act when there was nothing to prevent his acting (*d*) he cannot claim a legacy given to him for his trouble in the executorship (*e*), and an annuity, limited to a trustee during the continuance of his office, cannot be claimed when the duties of the office have ceased by the absolute vesting of the property (*f*).

12. **Amount of allowance not expressed.** — Where the settlor has directed a remuneration to the trustee, but has not declared the *amount*, a reference will be directed to settle the *quantum meruit*, according to the circumstances of the case (*g*).

13. **Contract for an allowance with the cestui que trust.** — The trustee may also, at the time of accepting the trust, *contract* for an allowance or remuneration for his services (*h*); but bargains of this kind are watched by the Court with exceeding jealousy (*i*), and must be freely made and not submitted to from pressure (*j*); and where the person about to become trustee and bargaining for remuneration is a solicitor, who is *acting as such in the preparation of the instrument of trust which purports to confer the right of remuneration*, there would seem to be considerable difficulty in upholding the contract unless the client had independent professional advice, or unless, at all events, the solicitor can show that the precise nature of the arrangement was distinctly explained to the client (*k*).

14. **Terms of the contract must be fulfilled to the letter.** — Where the contract is valid originally, the conditions of it must be *fulfilled to the letter*, or the trustee is not entitled to his \*reward. An executor, who had no [\*632]

(*c*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury v. Spooner*, 5 Beav. 630.

(*d*) *Slaney v. Witney*, 2 L. R. Eq. 418.

(*e*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury v. Spooner*, 5 Beav. 630.

(*f*) *Hull v. Christian*, 17 L. R. Eq. 546.

(*g*) *Ellison v. Airey*, 1 Ves. 111, see 115; and see *Willis v. Kibble*, 1 Beav. 559.

(*h*) *Re Sherwood*, 3 Beav. 338; *Douglas v. Archbutt*, 2 De G. & J. 148.

(*i*) *Ayliffe v. Murray*, 2 Atk. 58.

(*j*) *Barrett v. Hartley*, 12 Jur. N. S. 426.

(*k*) *Moore v. Frowd*, 3 M. & Cr. 48.

legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands; but the Court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died before he had finished the affairs of the trust; and so the plaintiff's demand was disallowed (*a*).

15. **Contract for an allowance with the Court.** — A trustee dealing with the *Court*, is at liberty, before accepting the trust, to stipulate for any remuneration which the Court may choose to give him (*b*). But if he omit to contract with the Court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and we may add that in no case will the Court remunerate a trustee for his trouble by permitting him to make *professional charges* where the settlor has not so directed, but will compensate him for his trouble, if at all, by a regular and fixed salary (*c*).

16. **Mortgagee.** — During the continuance of the usury laws a *mortgagee* could not, as a general rule, have *bargained* for a compensation exceeding together with the actual interest the legal rate, for an agreement of this kind would have tended to usury (*d*). But after a long struggle certain special exceptions were established in favour of mortgagees *not in possession* of West Indian estates (*e*).

17. **Employment of agents.** — As a trustee will not be permitted to charge for his personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate.

(*a*) *Gould v. Fleetwood*, cited *Robinson v. Pett*, 3 P. W. 251, note (A).

(*b*) *Marshall v. Holloway*, 3 Sw. 452, 453; *Newport v. Bury*, 23 Beav. 30; *Brocksopp v. Barnes*, 5 Mad. 90, per Sir J. Leach; and see *Morison v. Morison*, 4 M. & Cr. 215.

(*c*) *Bainbrigge v. Blair*, 8 Beav. 588. See the observations of Lord Langdale, pp. 595, 596.

(*d*) See *Chambers v. Goldwin*, 9 Ves. 271.

(*e*) See the history of the struggle detailed in Lord Brougham's judgment in *Leith v. Irvine*, 2 M. & K. 277.

(*f*) *Nicholson v. Tutin*, 3 K. & J. 159.

18. **Collector of rents.**—Thus a trustee, though he may not act as a collector himself with a commission (*f*), may, if the case require it, appoint a *collector of rents* (*g*), [or of book debts (*h*),] at a commission.

19. **Bailiff.**—As a man is not bound to be his own *bailiff*, if a trustee \*employ a skilful person in that [\*633] capacity, the salary must be allowed (*a*); at least the Court will grant that indulgence where the estate is at such a distance that the trustee must have appointed a bailiff had the estate been his own (*b*).

20. **Attorney.**—An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the Master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "it was clear that if an executor paid an *attorney* for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the Master to tax the items of the bill (*c*).

21. **Accountant.**—If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an *accountant*, he is entitled to charge the trust estate with it under the head of expenses (*d*).

22. In *Weiss v. Dill* (*e*) the executor of a trader had employed an agent to *collect debts*, which were numerous and only paid after repeated applications, at a commission of 5 per cent. The Master had reduced the commission to 2½ per

(*g*) *Davis v. Dendy* (the case of a mortgagee), 3 Mad. 170; *Stewart v. Hoare*, 2 B. C. C. 633; and see *Wilkinson v. Wilkinson*, 2 S. & S. 237; *Re Westbrooke*, 2 Ph. 631.

[(*h*) *Re Brier*, 26 Ch. D. 238.]

(*a*) *Bonithon v. Hockmore*, 1 Vern. 316; *Chambers v. Goldwin*, 9 Ves. 272, *per* Lord Eldon.

(*b*) *Godfrey v. Watson* (as to a

mortgage), 3 Atk. 518, *per* Lord Hardwicke.

(*c*) *Macnamara v. Jones*, 2 Dick. 587.

(*d*) *New v. Jones*, Exch., Aug. 9, 1833, cited 9 Jarm. Prec. 338; *Henderson v. M'Iver*, 3 Mad. 275.

(*e*) 3 M. & K. 26; and see *Giles v. Dyson*, 1 Stark. N. P. C. 32; *Hopkinson v. Roe*, 1 Beav. 180; *Day v. Croft*, 2 Beav. 488.

cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said, "Executors, generally speaking, are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents; I have some doubt whether in this case the Master ought to have made *any* allowance, but with the allowance of 2½ per cent. the executor must be content." The observations of Sir J. Leach might seem at first either to cast doubt upon the general right of a trustee to employ salaried agents in fitting cases, or to establish a distinction between the collection of *debts* and the collection of *rents*, but it cannot be supposed that his Honour intended to reverse his [\*634] \*previously expressed views on the general principle (a), and there seems no ground for any such distinction as that adverted to. The decision in substance was, that the Court declined to over-rule the Master's opinion on the question of *quantum*.

## SECTION II.

### ALLOWANCES TO TRUSTEES FOR EXPENSES.

1. **General rule.** — Though a trustee is allowed nothing for his *trouble*, he is allowed everything for his *expenses out of pocket* (b). "It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust" (c). Even where trustees had been *wrongfully appointed* but acted

(a) See *Wilkinson v. Wilkinson*, 2 S. & S. 237; [*Re Brier*, 26 Ch. D. 238.]

(b) *How v. Godfrey*, Rep. t. Finch, 361; *Re Ormsby*, 1 B. & B. 190, per Lord Manners; *Hide v. Haywood*, 2 Atk. 126; *Caffrey v. Darby*, 6 Ves. 497, per Sir W. Grant; *Godfrey v. Watson*, 3 Atk. 518, per Lord Hard-

wicke; *Fofoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 512, 515, per Lord Cottenham.

(c) *Worrall v. Harford*, 8 Ves. 8; and see *Dawson v. Clarke*, 18 Ves. 254; *Attorney-General v. Mayor of Norwich*, 2 M. & Cr. 424; *Morison v. Morison*, 7 De G. M. & G. 214.

*bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses, notwithstanding the defect of title (*d*).

2. **Travelling expenses.**—A trustee will be entitled to be reimbursed his *travelling* expenses (*e*), provided they be properly incurred (*f*).

3. **Employment of solicitor.**—Trustees are justified in employing a *solicitor* for the better conduct of the trust (*g*). And a trustee is entitled to be paid all costs properly incurred for which he is liable to the solicitor so employed; as where *two* executors, defendants in an administration suit, gave a *joint retainer* to a firm of solicitors, and one of the executors became bankrupt and was a debtor to the estate, it was held that the other executor, being liable for the whole costs under \*the joint retainer, was entitled to the [\*635] whole costs as against the estate (*a*). [But this case has been dissented from by the late M. R., who held, in a similar case, that the solvent executor should be allowed only his own proportion of the costs up to the bankruptcy out of the estate, the defaulter's proportion being set off against the debt due from him, but that the costs incurred by both subsequently to the bankruptcy should be allowed in full (*b*). And this view has since been approved (*c*). The proportion of the common costs which should be allowed to the solvent trustee is a matter for the Taxing Master (*d*).] And the sums paid will, at the instance of the *cestuis que trust*, though not liable to taxation, be looked over and moder-

(*d*) *Travis v. Illingsworth*, W. N. 1868, p. 206.

(*e*) *Ex parte Lovegrove*, 3 D. & C. 763; and see *Ex parte Elsee*, 1 Mont. 1; *Ex parte Bray*, 1 Rose, 144. These were cases of assignees who, by 6 G. 4. c. 16, s. 106 (the Bankrupt Act then in force), were to have "all just allowances," but trustees are equally entitled to all just allowances *virtute officii*; see *Blackford v. Davis*, 4 L. R. Ch. App. 305.

(*f*) *Malcolm v. O'Callaghan*, 3 M. & Cr. 62; and see *Bridge v. Brown*, 2 Y. & C. C. C. 181.

(*g*) *Macnamara v. Jones*, Dick. 587.

(*a*) *Watson v. Row*, 18 L. R. Eq. 680.

[(*b*) *Smith v. Dale*, 18 Ch. D. 516; this case probably referred to a bankruptcy under the law as it existed prior to the Act of 1869, as under that Act the bankrupt trustee would not have been entitled to his costs after the bankruptcy until he had made good his default. See *post*, Chap. xxxii, s. 5.]

[(*c*) *McEwan v. Crombie*, 25 Ch. D. 175.]

[(*d*) *Smith v. Dale*, *McEwan v. Crombie*, *ubi supra*.]



ated (e). And trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences, if they be misled by the professional advice of such trustee solicitor (f).

(e) *Johnson v. Telford*, 3 Russ. 477; *Langford v. Mahoney*, 2 Conn. & Laws 317.

(f) *Alton v. Harrison* (a legatee's suit), and *Poyser v. Harrison* (a residuary legatee's suit), both which were consolidated and heard before V. C. Sir J. Stuart on 6th and 8th June, 1868. The testatrix, who died in 1851, devised her real and personal estate to two trustees, Ingle and Harrison (the former a solicitor, the latter a manufacturer), upon the usual trust for sale and conversion. And as to the residue after payment of legacies and annuities to invest upon sufficient securities in trust for a class of persons. The trustees lent 500*l.* upon mortgage to one Thornley, and another 500*l.* to one Walker, and in 1853 Ingle died insolvent. It afterwards turned out that both Thornley's security and Walker's security were second mortgages, and the whole money was lost. Ingle had been solicitor of the testatrix, and had made her will and acted as solicitor to the trust. The plaintiffs sought to make Harrison liable for the two sums of 500*l.* each as lent upon insufficient security. Harrison declared on oath that the value of the mortgaged property, free from incumbrances, was personally known to him, and was far in excess of the loan, and that the loss had arisen not from the inadequacy of value, but from the defect of title, viz., in the two mortgages being second mortgages; that when the advances were made he fully believed that in each case the security was a first mortgage, and that he had relied as to the title upon the legal advice of Ingle, who had fraudulently represented the security as a fit and proper one; that the trustees had a right to em-

ploy one of themselves as solicitor to the trust (though no professional profits could be allowed), and that Harrison was entitled to the same protection from the legal advice given by Ingle, as if the trustees had employed a third person as solicitor, who had approved the title on their behalf. However, the Vice-Chancellor ruled that two trustees, one of whom was a solicitor, were liable to all the consequences if they employed one of themselves as such solicitor, instead of calling in a third person; and his Honour put the case of a single trustee, a solicitor, and asked whether it could be contended that such trustee was not liable for the consequences if he acted without other professional advice, and his Honour decided that Harrison was made liable for both the sums lent. This point seems to have arisen for the first time, and the judgment of the V. C. may be supported on principle; for if two persons be appointed trustees, they ought in matters of title to take professional advice, and for that purpose to employ a competent solicitor; but the selection of a proper legal adviser must be the *joint* act of the two, and as a man cannot be judge in his own case, they cannot appoint one of themselves to the office. *A fortiori* if there be a single trustee, a solicitor, he cannot act himself as solicitor and claim the same protection as if he had appointed another. When a settlor appoints a person a trustee, who is also a solicitor, he does not in the absence of any special direction, mean him also to act as solicitor; for a person may be a very good trustee and yet a very bad solicitor. The settlor selects his trustee, not because he is a solicitor or valuer, or

**\*4. Fees to counsel.**—So a trustee may give *fees* [\*636] to counsel and shall have allowance thereof (a).-

**5. [Costs of opposing Bill in Parliament.**—And a trustee will be allowed the costs of opposing a bill in Parliament which affects the trust estate (b).

**Of protecting the estate.**—And the Court will sanction the payment by the trustees of settled estates of costs which have been properly incurred by the tenant for life for the protection of the estates, whether as plaintiff or as defendant (c).

The Settled Land Act, 1882, expressly authorizes trustees of a settlement to reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them (d).]

**6. Extra costs.**—And if a trustee be sued by a stranger concerning the trust, and have his costs paid him as between *party and party*, and the *cestui que trust* afterwards institute proceedings for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation (e); and if a trustee as defendant be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by some misconduct, be entitled *as between him and his cestui que trust* to be reimbursed the costs which he has paid, and also those which he has himself incurred (f). The fact of a trustee having been unsuccessful in litigation, either as plaintiff or defendant, will not in the absence of misconduct disentitle him to be reimbursed his costs (g), but a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings

fills any other scientific capacity, but because he is a person to be trusted with the property and capable of managing it with the aid of professional advice.

(a) Cary, 14; Poole v. Pass, 1 Beav. 600.

(b) *Re Nicoll's Estates*, W. N. 1878, p. 154.]

(c) *Re Earl de la Warr's Estates*, 16 Ch. D. 587; 51 L. J. N. S. Ch. 407; *Re Lord Rivers' Estate*, 16

Ch. D. 588, n. And see 45 & 46 Vict. c. 38, s. 36.]

[(d) S. 43.]

(e) *Amand v. Bradburne*, 2 Ch. Ca. 138; *Ramsden v. Langley*, 2 Vern. 536; and see *Fearn v. Young*, 10 Ves. 184..

(f) *Lovat v. Fraser*, 1 L. R. H. L. Sc. 37, *per* Lord Kingsdown.

(g) *Courtney v. Rumley*, 6 I. R. Eq. 99.

were occasioned by his own negligence in the first [\*637] \*instance (a); or were improperly instituted by himself (b); and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor; for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client), will be moderated by the Court by a deduction of such charges as may appear irregular and excessive (c).

**Interest not allowed.** — And the trustee will not be allowed interest on the costs, though at the time he paid them he had no trust monies in his hands (d).

[7. **Costs of trustee defending his conduct in the trust.** — Where a bill was filed to set aside a decree for a compromise on the ground of personal fraud in one of the trustees in obtaining the decree, but the charge of fraud was disproved, and the bill dismissed with costs to be paid by the next friend of the plaintiff, who, however, was unable to pay them, it was held that the trustee was entitled to have his costs discharged out of the trust estate, for the defence was by him not on his own behalf but for the benefit of the trust estate, and that his right was not affected by the fact that his character was incidentally cleared in the suit (e).]

**8. Allowance for expenses besides remuneration for trouble.** — Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for *expenses*. A tes-

(a) *Caffrey v. Darby*, 6 Ves. 497; *Courtney v. Rumley*, 6 Ir. Eq. 99.

(b) *Peers v. Ceeley*, 15 Beav. 209; *Leedham v. Chawner*, 4 K. & J. 458.

(c) *Johnson v. Telford*, 3 Russ. 477; *Allen v. Jarvis*, 4 L. R. Ch. App. 616. As to the right of the *cestui que trust* to obtain a taxation as against the solicitor, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there cited; *Re Dawson*, 28 Beav. 605; *Re Press*, 35 Beav. 34; *Re Brown*, 4 L. R. Eq. 464, in which it was held, that the costs are to be taxed as between solicitor and client;

but that if not proper, having regard to the nature of the trust, they can only be recovered from the trustee personally, and are not chargeable as between the solicitor and the *cestui que trust*.

(d) *Gordon v. Trail*, 8 Price, 416. But if he pays off a debt carrying interest, he stands in the place of the creditor in respect of interest; *Re Beulah Park Estate*, 15 L. R. Eq. 43; *Finch v. Pescott*, 17 L. R. Eq. 554.

[(e) *Walters v. Woodbridge*, 7 Ch. D. 504.]

tator bequeathed to his acting trustees for the time being the yearly sum of five guineas apiece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about fifty houses in London, thirty-four of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said, "The annuity was given to them as a recompense for the care and trouble which would attend the due execution of the office; and if it was consistent with the due execution of the office to employ a collector, they were entitled to the annuity. A provident owner might well employ a collector in \*such a case, and the labour of such a [\*638] collection could not be imposed on the trustee" (a).

9. **Amount of expenses.** — A regular account of the expenses should invariably be kept; but where this has not been done the Court has ordered a *reasonable allowance* to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account should not meet with any encouragement. Thus in *Hethersell v. Hales* (b) the trustee put in a general claim for 2500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The Court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this nature; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning monies to creditors, and treating with them and stating their debts, and procuring and agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the Court was of opinion that the trustee might well deserve the whole 2500*l.*, yet would not allow but 2000*l.*, which the trustee was to have."

(a) *Wilkinson v. Wilkinson*, 2 S. Shaftesbury, 7 Ves. 480; *Fountaine & S. 237*; and see *Webb v. Earl of v. Pellett*, 1 Ves. jun. 337.

(b) 2 Ch. Rep. 158.

10. **Extraordinary outlay.** — As it is a rule that the *cestui que trust* ought to save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a *plain and great hazard of it*, the trustee ought to be repaid (c). So where a trustee employed a bailiff to fell some trees, and the wood-cutter allowed a bough to fall on a passer by, who was injured, and recovered damages from the trustee, it was held that as the trustee had meant well, had acted with due diligence, and had employed a proper agent to do an act which was within the sphere of the trustee's duty, and the agent made a mistake, the trustee was entitled to charge the damages on the trust estate (d).

[11. **Expenses of carrying on a business.** — If a trustee is authorised to carry on a business and to \*employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business; but this right is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property; and where the trustee is in default and is not entitled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms (a). But

(c) *Balsh v. Hyham*, 2 P. W. 455, per Lord King; and see *Attorney-General v. Mayor of Norwich*, 2 M. & Cr. 424; *Attorney-General v. Pearson*, 2 Coll. 581; *Quarrell v. Beckford*, 1 Mad. 282; *Sandon v. Hooper*, 6 Beav. 246; *Bright v. North*, 2 Ph. 216; *James v. May*, 6 L. R. H. L. 328.

(d) *Benett v. Wyndham*, 4 De G. F. & J. 259.

[(a) *Re Johnson*, 15 Ch. D. 548; *Ex parte Garland*, 10 Ves. 110; *Re Sumner*, W. N. 1884, p. 121; *Gallagher v. Ferris*, 7 L. R. Ir. 489. These authorities proceed on this principle, that where a particular part of a

trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned, per *Selborne, L. C.*, *Strickland v. Symons*, 26 Ch. D. 248; and see *Boylan v. Fay*, 8 L. R. Ir. 374.]

where the trustee for sale of a business carries on the business without authority for the benefit of the *cestuis que trust*, and incurs liabilities to tradesmen in so doing, there is no right in the creditors to come against the trust estate, but they must look to the trustee personally (b).]

12. **Expenses a lien on the trust estate.** — The expenses incurred by a trustee in the execution of his office are treated by the Court as a first charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of the trustee's just demands (c) and in a suit for the administration of the

[(b) *Strickland v. Symons*, 22 Ch. D. 666; affirmed, 26 Ch. D. 245.]

(c) See *Ex parte James*, 1 D. & C. 272; *Hill v. Magan*, 2 Moll. 460; *Norwich Yarn Company*, 22 Beav. 143; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Re Exhall Coal Company*, 35 Beav. 449; *Oliver v. Osborn*, W. N. 1867, p. 245; *Re Layton's Policy*, W. N. 1873, p. 49.

In *Trott v. Dawson*, 1 P. W. 780, Lord Macclesfield said, "Dawson, the assignee of Archdale, cannot be in a better case than Archdale under whom he claims. Wherefore, as Archdale, would not have had the assistance of a Court of equity without paying for the charge and trouble which Trott had been at in relation to the trust, so, by parity of reason, the defendant Dawson, as claiming under Archdale, must do the same thing which it was incumbent upon Archdale to have done."

But the decision in this case was reversed in the House of Lords; and hence the inference has been drawn that a trustee gives credit for the expenses, not to the estate, but to the person of the *cestui que trust*, and that the assignee is not liable for the trustee's expenses incurred in the time of the assignor. The case is reported much more at length in Brown, 7 B. P. C. 266, and the circumstances were briefly these : — An eighth of the proprietorship of the province of Caro-

lina had been conveyed in 1684 to Amy in trust for four persons. The whole equitable interest had become subsequently vested in John Archdale, who settled it upon Dawson and his wife. Dawson filed a bill against the co-heirs of Amy for a conveyance; and the question between the parties was, whether the expenses incurred by Amy ought or not to be first paid and satisfied. On a reference to the Master it was found that Amy had been active in the trust from 1684 to 1697, and during that time had expended various sums of money; that the proprietors of the province had ordered Amy one grant of 12,000 acres; had created him Landgrave, with a further grant of 48,000 acres; and had also presented him with one of the eight proprietorships, which had fallen in by the death of a proprietor without heirs. It was entered on the books of the proprietors in 1698, that the grants had been made to Amy for his services generally, and particularly for his faithful discharge of the trust; that Amy had agreed to convey the estate on request to W. J., who was to succeed him in the office, and by whom subsequently the trust was exclusively managed. It did not appear that the first two grants had ever been perfected, or had become beneficial; but the grant of the proprietorship had been accepted and acted upon. It was under

[\*640] fund \*in respect of which the expenses have been incurred, the lien of the trustee will be paid even before the costs of suit (a). [And the expenses are a first charge as well upon the income as upon the corpus of the estate, and the trustees have therefore the right to retain their expenses out of the income until provision can be made for raising them out of the corpus (b).] But the trustee of a *void* trust deed cannot charge his expenses as against persons who establish the invalidity of the deed (c); though he will be allowed for improvements (d). There will be no lien for expenses incurred by trustees in respect of an act done in excess of their powers, and therefore in breach of their duty (e). And the Court has refused to give effect to a trustee's lien by a foreclosure decree, or a sale, which would be the destruction of the trust itself; but the Court has gone as far as it could by delivering the deeds into his custody and prohibiting any disposition of the property without previous discharge of the trustee's lien (f).

[13. **Enforcing right to indemnity.**—Where a trustee has a right of indemnity out of the trust estate, he may at any time come to the Court to enforce it, and is under no obligation to wait until the trust estate has been turned into money under the trust (g).]

14. **Advance by cestui que trust.**—If trustees have to raise a certain sum which is properly chargeable on the corpus, and a *cestui que trust*, at the *request of the trustees*, advances money for the purpose, the *cestui que trust* stands

these circumstances that Lord Maclesfield directed a conveyance of the estate, subject to the payment of Amy's expenses; but on appeal to the House of Lords the decree below was reversed. The question appears to have been, not whether Amy's expenses, due from the assignor, were a lien upon the estate, but whether the grants made to Amy had not been accepted by him as a full compensation.

(a) See *Morison v. Morison*, 7 De G. M. & G. 226; *Re Exhall Coal Company*, 36 Beav. 449.

[(b) *Stott v. Milne*, 25 Ch. D. 710.]

(c) *Smith v. Dresser*, 1 L. R. Eq. 651; 35 Beav. 378.

(d) *Woods v. Axton*, W. N. 1866, p. 207.

(e) *Leedham v. Chawner*, 4 K. & J. 458; in which case the Court held that there was no lien even as against a *cestui que trust* who knew and approved of the proceedings, but otherwise remained passive.

(f) *Darke v. Williamson*, 25 Beav. 622.

[(g) *Re Pumfrey*, 22 Ch. D. 255, 282.]

\*in the place of the trustees and has a lien on [\*641] the corpus for the amount (a).

15. **Lien does not extend to the trustees' agents.** — Although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien. And the law is so settled, notwithstanding an express declaration by the settlor that the trustees shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent. In every deed is implied a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*. It would be a mischievous principle to hold, that every person with whom the trustees had incurred a just and fair demand might sue the trustees, and come for an account of the whole administration (b).

16. **Secus if there be a positive direction to employ a particular agent.** — But a *solicitor* in accounting for his receipts to the trustees may *set off his costs* (c). And a *positive direction* to the trustees to employ a particular person as auditor or receiver, and allow him a proper salary, will constitute a trust in his favour, and, of course, give him claim against the trust fund (d). But if a testator merely *recommend or express a desire* that his trustees should employ him as receiver, the question is, whether the words used amount to a trust, or only to an expression of opinion and advice: and to discover the meaning, the Court examines the provisions of the will, and if it finds that, to consider the words as a trust would be inconsistent with the general character of the will, which assumes that the administration of the estate is to be unfettered by such a trust, the Court comes to the conclusion that the words were meant only by way of

(a) *Todd v. Moorhouse*, 19 L. R. Eq. 69; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Clack v. Holland*, 19 Beav. 262.

(b) *Worrall v. Harford*, 8 Ves. 4, see 8; *Hall v. Laver*, 1 Hare, 571; *Fellows of Heriot's Hospital v. Ross*,

12 Cl. & Fin. 507; *Francis v. Francis*, 5 De G. M. & G. 108.

(c) *Re Sadd*, 34 Beav. 650.

(d) *Williams v. Corbet*, 8 Sim. 349; *Hibbert v. Hibbert*, 3 Mer. 681; *Consett v. Bell*, 1 Y. & C. C. C. 569.



suggestion (e). [And where a will contained a direction that "the testator's solicitor should be the solicitor to his estate and to his trustees in the management and carrying out the provisions of his will," it was held that no trust or duty was imposed on the trustees to continue the testator's solicitor as their solicitor (f).]

17. **Trustee's agents not accountable to the cestuis que trust.**— *Vice versâ*, the agent of a trustee is accountable to the employer only, the trustee, and not to the *cestui que* [\*642] *trust* (g); and \*an action by *cestui que trust* against the trustee and *his solicitor*, alleging improper payments out of the trust fund by the trustee to the solicitor, [cannot be maintained as against] *the solicitor* (a). But under the special provisions of the Solicitors' Act (b), *cestuis que trust* may, at the discretion of the Court, obtain an order to tax the bill of the solicitor employed by the trustee (c), and generally *cestuis que trust* may proceed against an agent where he has not confined himself to the duties of an agent, but by accepting a delegation of the whole trust (d), or by fraudulently mixing himself up with a breach of trust (e), has himself become a trustee by construction of law.

18. **Monies in hands of Secretaries of State.**— Monies voted by Act of Parliament for the *public service*, are not trust funds in the hands of the *Secretaries of State* for any

(e) *Shaw v. Lawless*, 1 Ll. & G. t. Sugd. 154; reversed 1 Dr. & Walsh, 512; 5 Cl. & Fin. 129; Ll. & G. t. Plunk. 559; Finden v. Stephens, 2 Ph. 142; Knott v. Cottee, 2 Ph. 192.

[(f) *Foster v. Elsley*, 19 Ch. D. 518.]

(g) *Myler v. Fitzpatrick*, 6 Mad. 360, per Sir J. Leach; Attorney-General v. Earl of Chesterfield, 18 Beav. 596; and see *Langford v. Mahony*, 2 Conn. & Laws. 317; *Lockwood v. Abdy*, 14 Sim. 441; *Keane v. Roberts*, 4 Mad. 350; *Archer v. Laverder*, 9 I. R. Eq. 225, per Cur.

(a) *Maw v. Pearson*, 28 Beav. 196; [*Re Spencer*, 51 L. J. N. S. Ch. 271.]

(b) 6 & 7 Vict. c. 73, s. 39.

[(c) *Re Spencer*, *ubi supra*.] As to the circumstances under which the

Court will direct taxation at the instance of a *cestui que trust*, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there referred to; and *Re Dawson*, 28 Beav. 605.

(d) *Myler v. Fitzpatrick*, 6 Mad. 360; and see *Pollard v. Downes*, 1 Eq. Ca. Ab. 6; *Lee v. Sankey*, 15 L. R. Eq. 204.

(e) See *Fyler v. Fyler*, 3 Beav. 550; *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 199; *Portlock v. Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; *Morgan v. Stephens*, 3 Giff. 226; *Hardy v. Caley*, 33 Beav. 365.

particular individual, but for the general purposes of the office. The persons employed by them, therefore, have no lien which they can enforce in equity (*f*).

19. **Trust of two estates.** — If a person be trustee of different estates for the *same cestuis que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is presumed that he may apply to their discharge any money which has come to his hands from any other of the estates; but he would not be justified in mixing up claims under one instrument of trust with those under another (*g*). [But where different estates are held under the same instrument for different *cestuis que trust*, the trustee cannot reimburse himself from one estate losses incurred in *bond fide* administration of the other estate (*h*).]

20. **How expenses recoverable where no trust estate.** — If the trust estate fail, the trustee may then institute proceedings against the *cestui que trust* on whose *behalf* and at whose *request* he acted, to recover from him personally the amount of the \* money expended (*a*); and the rule [\*643] applies to the case of a *cestui que trust* under *coverture*, to the extent of any property settled to her *separate use*, and where her anticipation is not restrained (*b*); and, generally, trustees acting with the sanction of their *cestuis que trust*, and not exceeding their powers, may call upon their *cestuis que trust* personally to reimburse them any necessary outlay (*c*); and in a late case it was held that a trustee who, in that character, had incurred a legal liability, might call upon the *cestui que trust* in equity to give an *indem-*

(*f*) *Grenville-Murray v. Earl of Clarendon*, 9 L. R. Eq. 11.

(*g*) *Price v. Loaden*, 21 Beav. 508.

(*h*) *Fraser v. Murdock*, 6 App. Cas. 855; and cf. *Re Johnson*, 15 Ch. D. 548.]

(*a*) *Balsh v. Hyham*, 2 P. W. 463; *Ex parte Watts*, 3 De G. J. & S. 394; *Re Southampton Imperial Hotel Company*, 26 L. T. N. S. 384, 20 W. R. 485; *Jervis v. Wolferstan*, 18 L. R.

Eq. 18; [and see *Fraser v. Murdoch*, 6 App. Cas. 855, 872.]

(*b*) *Butler v. Cumpston*, 7 L. R. Eq. 16.

(*c*) *Ex parte Chippendale*, 4 De G. M. & G. 19, see 54; *Re Exhall Coal Company*, W. N. 1867, p. 244; *Ex parte Challis*, 16 W. R. 451; 17 L. T. N. S. 637; *James v. May*, 6 L. R. H. L. 328; and see *Hemming v. Maddock*, 9 L. R. Eq. 175.

nity against the liability before any actual loss had accrued (*d*).

[**Indemnity against liability.**—In a more recent case, however, Fry, J., was of opinion that a person who has undertaken a position of responsibility for another which entitles him to an indemnity cannot sue before the damage has accrued, which gives rise to the right to indemnity, and he refused relief to a plaintiff who was holding, as a trustee for the defendant, shares not fully paid up in a company in liquidation, but on which no call had been actually made (*e*). And where the trustee acts at the instance of the maker of the trust, at any rate where the maker of the trust is not also beneficially interested under the trust instrument, the trustee has no right to personal indemnity from the settlor, but must look exclusively to the trust funds to make good his expenses or losses (*f*).]

21. **Claim of expenses against a cestui que trust personally.**—But the trustee can establish no claim to reimbursement either against the *cestuis que trust* personally, or against the trust estate, where he has incurred the outlay not in the strict line of his duty, and without either the request or the implied assent of the *cestuis que trust* (*g*).

22. **Funds out of which expenses payable.**—Questions occasionally arise respecting the proper fund for payment of expenses. In one case (*h*), Sir John Leach decided that a provision made in a will for payment of *debts and* [\*644] *funeral and \* testamentary expenses* out of a particular fund, did not make that fund *primarily* liable for *costs of administration*. In a subsequent case, Lord Langdale

(*d*) Phené v. Gillan, 5 Hare, 1, see pp. 9, 13; and see *Re Southampton Imperial Hotel Company*, 26 L. T. N. S. 384; 20 W. R. 435.

[(*e*) Hughes - Hallett v. Indian Mammoth Gold Mines Company, 22 Ch. D. 561; but see Lord Ranelagh v. Hayes, 1 Vern. 189; Phené v. Gillan, *ubi supra*.]

[(*f*) Fraser v. Murdoch, 6 App. Cas. 855, 872.]

(*g*) Leedham v. Chawner, 4 K. & J. 458. In *Collinson v. Lister*, 20 Beav. 368, where the advances were not proper, the M. R. said, "No assets exist out of which the executor could seek for payment, and of course, it could not be contended that the plaintiffs (who were the *cestuis que trust*) were liable to repay the advances."

(*h*) Brown v. Groombridge, 4 Mad. 495.

arrived at a different conclusion (*a*); [and after considerable variation of judicial opinion, the later cases seem to have established the rule that the words *testamentary expenses* include the *costs of administration* (*b*). So] where the trust was for "payment of debts, funeral expenses, and the costs and charges of proving and attending the execution of the will, and the several trusts therein contained" (*c*), [and where the trust was "to pay debts and *executorship expenses* and probate duty" (*d*),] it was held that the words included costs of administration.

23. **Exoneration of personalty.**—Where a testator bequeathed "a *leasehold* house and all other his *personal property*" to his wife, and then devised his *real estate* to be sold, the proceeds to be applied in "payment of *funeral and testamentary expenses and debts*," and the "*residue*" to be invested, it was held that the funeral and testamentary expenses and debts were thrown upon the *real estate* in exoneration of the *personal estate*, but that the costs of the special case for taking the opinion of the Court were not "testamentary expenses," and therefore fell upon the personalty (*e*); [but having regard to the present rule, it is conceived that this case would not now be followed on the question of costs.]

24. **Trust to pay costs of trust.**—A trust in a will of real and personal estate to pay out of the personal estate the expenses of probate and "the *execution of the trusts* of the will," does not authorize the trustee to apply the fund in payment of any other expenses than what would be payable by the *execu-*

(*a*) *Wilson v. Heaton*, 11 Beav. 492.

[(*b*) *Miles v. Harrison*, 9 L. R. Ch. App. 316; *Harloe v. Harloe*, 20 L. R. Eq. 471; *Sharp v. Lush*, 10 Ch. D. 468; *Penny v. Penny*, 11 Ch. D. 440; *Morrell v. Fisher*, 4 De G. & Sm. 422, but see *contra*,] *Stringer v. Harper*, 26 Beav. 585; *Linley v. Taylor*, 1 Giff. 67; *Webb v. De Beauvoisin*, 31 Beav. 573; *Gilbertson v. Gilbertson*, 34 Beav. 354; *Hill v. Challinor*, W. N. 1867, p. 139; *Lees v. Lees*, 6 I. R. Eq. 259; *M'Cormick v. Patten*, 5 I. R. Eq. 295; *Re Biel's Estate*, 16 L. R.

Eq. 577. [In *Webb v. De Beauvoisin*, where the trust was for "payment of debts, testamentary and other expenses and legacies under the will," and in *Coventry v. Coventry*, 2 Dr. & Sm. 470, where the trust was "to pay funeral and testamentary and legal expenses," it was held that the words included costs of administration.]

(*c*) *Alsop v. Bell*, 24 Beav. 451, see p. 469.

[(*d*) *Sharp v. Lush*, 10 Ch. D. 468.]

(*e*) *Gilbertson v. Gilbertson*, 34 Beav. 354.

*tors* in that character, and therefore does not authorize the application of the personal estate in payment of the expenses incurred in the execution of trusts declared of the testator's *real* estate (*f*). .

(*f*) Lord Brougham *v.* Lord Poulett, 19 Beav. 119; and see Sanders *v.* Miller, 25 Beav. 154.

HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE OFFICE.

WE shall conclude the subject of the *Office* of Trustee by considering in what manner he may divest himself of that character.<sup>1</sup>

**How the trust may be relinquished.** — The only modes by which he can accomplish this object are the following: *First*, He may have the universal consent of all the parties inter-

<sup>1</sup> *Discharge of the trustee.* — If the time during which a trust was to continue has elapsed, or all the duties required of the trustee have been performed, the trustee, upon proper accounting, will be discharged; *Cook v. Gardner*, 130 Mass. 313; *How v. Waldron*, 98 Mass. 281; *Manice v. Manice*, 43 N. Y. 303. Otherwise, a trustee can be discharged only by one of the three ways mentioned in the text; *Webster v. Vandeverter*, 6 Gray, 428; *Craig v. Craig*, 3 Barb. Ch. 76; *Cruger v. Halliday*, 11 Paige, 319; *Drane v. Gunter*, 19 Ala. 731. A trustee cannot abandon the trust and his responsibilities under it at any time which suits his convenience; *Thatcher v. Candee*, 3 Keyes, 157; *Webster v. Vandeverter*, 6 Gray, 428; *Henderson v. Sherman*, 47 Mich. 267. Nor can a trustee be discharged by consent unless all parties in interest unite in consenting, and all *cestuis que trust* are *sui juris*; *Cruger v. Halliday*, 11 Paige, 314. If the declaration of trust provides for the removal of a trustee, the removal may take place in accordance with its terms, which must, however, be strictly followed, as is the case with statutory enactments; *Tavener v. Robinson*, 2 Rob. (Va.) 280. If a trustee sues without compensation and the trust is to continue for an unspecified time, he may obtain a decree of court granting a discharge, when his duties become inconvenient or onerous to him; *Bogle v. Bogle*, 3 Allen, 158. Equity courts have power to remove trustees, or to allow them to resign; *In re Eastern R. R. Co.*, 120 Mass. 412; *Bowditch v. Banaelos*, 1 Gray, 220; *Field v. Arrowsmith*, 3 Humph. 442; *De Peyster v. Clendinning*, 8 Paige, 295. Trustees may, if a trust is divisible, be allowed to resign a part, and continue as trustees of the remainder; *Craig v. Craig*, 3 Barb. Ch. 76; *Curtis v. Smith*, 6 Blatchf. 537; but they will not be involuntarily removed from the control of a part; *Sturges v. Knapp*, 31 Vt. 1. The usual method on application to the courts for the removal or appointment of trustees is by a bill in equity; *Bowditch v. Banaelos*, 1 Gray, 220; *Mitchell v. Pitner*, 15 Ga. 319; *Re Livingston*, 34 N. Y. 567; *Williamson v. Suydam*, 6 Wall. 723. Any of the parties interested, upon notice to all the others, may seek the removal or appointment of a trustee; *Bradstreet v. Butterfield*, 129 Mass. 339; *Abbott, Pet'r*, 55 Me. 580; *Guion v. Melvin*, 69 N. C. 242; but see *Hartman's App.* 90 Pa. St. 206.

ested; *Secondly*, He may retire by virtue of a special power contained in the instrument creating the trust, [or a statutory power applicable to the trust;] or, *Thirdly*, He may obtain his release by application to the Court.

*First.* By consent.

1. **Trustee may retire with consent of cestuis que trust.** —

As no *cestui que trust* who concurs in a breach of trust by the trustee can afterwards call him to account for the mischievous consequences of the act, it follows, that where *all* the *cestuis que trust*, being *sui juris*, lend their joint sanction to the trustee's dismissal, they are precluded from ever holding him responsible on the ground of delegation of his office (a).

2. **All must concur.** — But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest (b).

3. **Cestuis que trust not sui juris.** — And the *cestuis que trust* who join must be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent. But a *feme covert* is considered to be *sui juris* as to her separate estate where there is no restraint against anticipation (c); and as to *real estate* she can, with the consent of her husband, bind her interest by an assurance under the Fines and Recoveries Act.

4. **Not in existence.** — If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear, that as the [\*646] trustee cannot have the sanction of \* all the parties interested, he cannot with safety be discharged from the trust.

*Secondly.* A trustee may retire by virtue of a special power contained in the original instrument, [or a statutory power applicable to the trust.]

1. **Trustee may retire under a power.** — The person who creates the trust may mould it in whatever form he pleases,

(a) *Wilkinson v. Parry*, 4 Russ. 276, per Sir J. Leach.

(b) See *supra*, p. 498, note (e).

(c) See *infra*, chap. xxvii. s. 6.

and may therefore provide, that on the occurrence of certain events and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted (1).

2. **Usual form of the power.** — The form of power (*a*) most commonly in use is, that in case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them, shall “die or be abroad for twelve calendar months, or be *desirous of being discharged from*, or refuse, decline, or become incapable (*b*) to act in the trusts,” it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee (*c*), or the executors (*d*) or administrators of the survivor, by deed or writing,

(*a*) The best modern forms did contain the additional words, “or by the Court of Chancery or other competent authority,” in order to obviate the break in the chain of trusteeship which would otherwise have been occasioned by a resort to the court, but the addition is now unnecessary [for that purpose; see 44 & 45 Vict. c. 41, s. 33; but see *Cecil v. Langdon*, 28 Ch. D. 1, where the court was of opinion that where the power authorized the appointment of new trustees in the place of those originally appointed or to be appointed under the power, an appointment could not be made under the power in the place of a trustee who had been appointed by the court.]

(*b*) “Unfit” may be usefully added; see p. 658 *infra*.

(*c*) The best forms provide that a refusing or retiring trustee shall, if willing to execute the power, be deemed

to be a continuing trustee. As to the object of this addition, see p. 664 *infra*. But it is attended with this inconvenience, that if the refusing or retiring trustee do not join, evidence may be called for that he was *not willing*. Sometimes the power is given to the surviving, continuing, or other trustee, an addition which has been found useful in practice. See *Lord Camoys v. Best*, 19 Beav. 414.

(*d*) Better to say “acting executors or executor or administrators or administrator,” as otherwise if several executors be appointed, and one only proves, it may be objected (though the objection may be untenable) that the other executors must actually renounce before the acting executor can exercise the power, see *White v. M'Dermott*, 7 I. R. C. L. 1; *Worthington v. Evans*, 1 S. & S. 165; *Clarke v. Parker*, 19 Ves. 1; see *post*, p. 656, note (*e*).

(1) Every instrument where there is a continuing trust of an active character, should, of course, until the modern acts, have contained a power of appointment of new trustees, but, singularly enough, Lord Thurlow omitted to insert one in his own will, of which Lord Eldon and two others were named trustees. The defect was supplied by a private act of Parliament, 15th June, 1809 (49 G. 3, cap. clxxv.), by which power was given to the Court of Chancery, in case any of the three trustees “should die, or be desirous of being discharged from, or should refuse, or decline, or become incapable to act in the trusts,” to appoint a new trustee in a summary way upon petition.



[\*647] to nominate some other person to be a trustee; \*and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.

3. **Several sets of trustees.**—It often happens that in a settlement there are several sets of trustees—a term of 99 years for instance is vested in A. and B., and a term of 500 years in C. and D., and there is a limitation to E. and F. for the life of a person, with powers of sale and exchange, &c., and then a power of appointment of new trustees is given to “the surviving or continuing trustee or trustees.” If A. die who can appoint in his place? Is the power in B. as the survivor in that particular trust, or in B., C., D., E. and F. jointly as the survivors of the trustees *en masse*? This doubt has occasionally in practice led to expense, which might easily have been avoided by a few words in the power declaratory of the intention, as by limiting the power to “the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur.”

4. **Lord Cranworth's Act.**—Lord Cranworth's Act, provided against the omission of a power of appointment of new trustees in any instrument of trust, and also against defects in the power, by enacting generally, by the 27th section, that “whenever any *trustee*, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die or desire to be discharged from, or refuse or become unfit or incapable to act,” it should be lawful for the person nominated for that purpose by the instrument creating the trust, or if there should be no such person, or he should be unable or unwilling to act, then “for the surviving or continuing trustees or trustee for the time being, or the acting executor or administrator of the last surviving *and* continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees,” and the Act gave the usual directions for vesting the

trust estate (a); and the following section made the Act apply to the case of a trustee dying in the testator's lifetime. But it will be observed that the Act did not provide for the case of a trustee *going abroad*, and it cannot be safely assumed, until a decision, that the word "*refuse*" was meant to include a *disclaimer* (for a disclaiming trustee never was a trustee (b)); and its operation was, by the 34th \*section of the Act, restricted to instruments *inter vivos* executed after the passing of the Act (28th August, 1860), and to wills and codicils made, confirmed, or revived after that date.

**Two trustees in place of one.**—It has been held that the donee of the power under this Act could appoint two trustees in the place of an only trustee appointed by the settlor's will (a).

[5. 44 & 45 Vict. c. 41, s. 31.—The above provisions of Lord Cranworth's Act have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (b), and their place supplied by sect. 31, which enacts, that "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses, or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for that purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees." And the Act authorises an increase or reduction in the number of trustees, so that "except where only one trustee was

(a) 23 & 24 Vict. c. 145, s. 27.

(b) In *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was within the act, and it was held that an appointment of a new trustee by the continuing trustee under the act did not take away the general juris-

diction of the court to appoint in proper cases an additional trustee; and see *Re Jackson's Trusts*, 16 W. R. 572; 18 L. T. N. S. 80; and *post*, p. 656.

(a) *Re Breary*, W. N. 1873, p. 48.

[(b) 44 & 45 Vict. c. 41.]

originally appointed a trustee shall not be discharged under the section from his trust, unless there will be at least two trustees to perform the trust ;” and provides for the vesting of the trust property ; and makes the provisions of the section relative to a trustee who is dead include the case of a person nominated trustee of a will but dying in the testator’s lifetime, and those relative to a continuing trustee include a refusing or retiring trustee ; and the section applies to trusts created either before or after the commencement of the Act.

The section applies only so far as a contrary intention is not expressed in the instrument, if any, creating the trust ; but where a power of appointing new trustees had been given by a settlement, made in 1849, to “the surviving or continuing trustees or trustee,” which they or he were required to exercise with the consent of the tenant or tenants for life or in tail for the time being entitled in possession, it was held that the fetter imposed by the settlement did not

apply to an appointment under the powers of the [\*649] Act, and \* that the continuing trustee could appoint

new trustees under the Act ; the power in the settlement having in the events which had happened ceased to be exercisable (a). It would seem that an appointment under this section may be made by the personal representative of a sole trustee.<sup>1</sup>

6. The representatives of a deceased trustee do not, by declining to exercise the statutory power of appointment, render themselves liable to the costs of an application to the Court to appoint new trustees (b).

7. A settlement made in 1878 contained a declaration that the husband and wife during their joint lives should have power to appoint new trustees of the settlement. After the Conveyancing and Law of Property Act, 1881, came into operation, the husband and wife executed a deed appointing a new trustee in the place of one of the trustees who had *remained out of the United Kingdom for more than twelve months*, and it was held that the appointment was valid

[(a) *Cecil v. Langdon*, 28 Ch. D. 1.]

[(b) *Re Sarah Knight’s Will*, 26 Ch. D. 82.]

<sup>1</sup> *Re Shafto’s Trusts*, 29 Ch. D. 247.

under sect. 31 of the Act; and North, J., observed, "the intention of sect. 31 is that, whenever a person has been nominated by the instrument creating the power as the person to appoint new trustees, he has the power of filling up any vacancy occurring under the provisions of the section" (c).

It will be observed, however, that the husband and wife were in this case nominated to fill up vacancies in the trusteeship generally, and not only in certain specified events, and the observations of the learned judge must be read by the light of the existing circumstances, and the case is no authority that where the settlement has given the power of appointing new trustees in certain special events to A., he is by the Act empowered to appoint new trustees in any other event not mentioned in the settlement, but falling within sect. 31. The proper construction of the Act would seem to be that in such a case the power of appointing new trustees is in the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee.]

8. **Whether a new trustee is actually such until transfer of the estate to him.** — The words contained in the ordinary form which expressly confer all powers on the new trustee before the estate has been conveyed, show that a doubt has been felt by the profession, whether in the absence of these words the powers could be exercised until after *conveyance*, and the late Vice Chancellor of England, in a case where the words referred to did not occur, but there was simply a power of nomination and no direction for a conveyance, expressed his opinion to be that the person to be appointed was not invested with the character of trustee until he had both been nominated to \* the office by the [\*650] donee of the power, and the *trust property* had also been duly conveyed or assigned (a). But in a more recent case before Sir John Romilly, M. R. (b), where A. and B. were appointed trustees of a settlement, and after a lapse of 18 years A. disclaimed, and B. was desirous of retiring, and

[(c) *Re Walker and Hughes' Contract*, 24 Ch. D. 698.]

(a) *Warburton v. Sandys*, 14 Sim. 622.

(b) *Noble v. Meymott*, 14 Beav. 471.

the donee of the power nominated C. in the place of A., and D. in the place of B., and B. professed to assign the trust fund (consisting of a share of 3,000*l.* in the hands of trustees of another settlement) to C. and D., who filed their bill without their *cestuis que trust* to have the trust fund paid to them, it was objected against the validity of the appointment that A. had acted, and that consequently B. could not alone pass the trust fund, and that therefore the appointment of trustees was incomplete; but the Master of the Rolls held that, whether A. had acted or not, his disclaimer was a wish to retire, and that C. and D. were duly appointed, and were entitled to call for payment of the trust fund: that the *appointment* of new trustees, and the *conveyance* of the trust property to them were *two distinct and separate matters*, and that the transfer could only take place when the appointment was complete; and that various difficulties would arise from holding that the transfer of the trust fund was necessary to perfect the appointment. And in a subsequent case before the same judge, where there was the usual power of appointment of new trustees, with a direction for the conveyance of the trust estate, and the donee of the power appointed a new trustee in the place of a deceased trustee, but the trust estate was not conveyed, and the surviving trustee and new trustee then sold the estate and signed a receipt for the purchase-money, it was held that the purchaser acquired a good title (c). It would appear, therefore, that at the present day an actual conveyance of the legal estate, unless the power be specially worded, is not essential to the valid appointment of new trustees.<sup>1</sup>

(c) *Welstead v. Colville*, 28 Beav. 537.

<sup>1</sup> It is only necessary in some states for a new trustee to qualify, in order to vest the trust estate at once in him, special statutory provisions applying thereto. In such cases no conveyance is necessary to transfer the title; *Gibbs v. Marsh*, 2 Met. 243; *Parker v. Converse*, 5 Gray, 341; *Burdick v. Goddard*, 11 R. I. 516; the same is true if the trust instrument contains such a provision; *Webster Bank v. Eldridge*, 115 Mass. 424; *Ellis v. Railroad Co.* 107 Mass. 13. New trustees can only be appointed by the Court, unless special provision has been made; *Wilson v. Towle*, 36 N. H. 129. For the exercise of the power of appointment, see *Davoue v. Fanning*, 2 Johns. Ch. 252; *McKim v. Handy*, 4 Md. Ch. 230. Where trustees have the power to appoint new trustees, care should be taken that the selection be satisfactory to the *cestui que trust*; *Naglee's Est.* 52 Pa. St. 154.

9. **Mode of vesting trust estate.**—Should the trust estate consist of Bank Annuities, or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust of the stock or other property intended to be transferred, and after the execution of the deed the stock may be transferred into their joint names accordingly. If the trust estate consist of *chattels real, or other personal estate legally assignable*, two deeds, until a modern Act, were necessary. By the first, the old trustee assigned \* the chattel [\*651] interest to A., and then A. by indorsement re-assigned it to the old and new trustees as joint tenants. But now, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 21, a person may assign chattels real and other personal property *assignable at law* to himself and another, so that in such cases for the future one deed will be sufficient (1); [and the power has by the Conveyancing and Law of Property Act, 1881 (a), been extended to things in action.] If the trust estate be of a *freehold* nature, and by the terms of the instrument of trust the whole legal estate is to be vested in the trustees, there needs, in general, no other machinery than a simple conveyance under the Statute of Uses; for the old trustee may convey the lands to the joint use of himself and the new trustee, and the statute will operate to transfer the possession. But in *settlements which invest the trustees with powers*, the established form of the proviso has been thought to occasion the necessity of resorting to the use of two deeds. The language of the clause is, that "the *trust estate* shall be conveyed in such manner that the same may be vested in

[(a) 44 & 45 Vict. c. 44, s. 50.]

(1) The Act does not authorise an assignment by a person to himself (as by an executor to himself as legatee), nor by himself and another or others to himself, as by two co-executors to one of them as trustee, for in the first case he has the legal estate already and a declaration will shift the equitable interest, and in the second case so far as he has not the legal estate in himself the other or others can assign it or release it independently of the Act. The operation of the Act is limited to property *assignable at law*, for mere equitable interests shift according to the intention, and no legislative interference was required as to them.

the old and new trustees to the uses, trusts, intents, and purposes of the settlement." Now the meaning obviously is, that, as by the settlement an estate to preserve contingent remainders, or, it may be, some other interest, was limited to the trustees who are armed with the powers, should either of the trustees die, &c., and a new trustee be appointed, such estate *pur autre vie*, or other interest, should be transferred to the old and new trustees jointly. But the practitioner *ex majori cautela*, attached to the words, the possible, however improbable construction, that on the appointment of a new trustee the whole settlement should be re-opened, and that the fee-simple should *ab integro* be conveyed to the old and new trustees to all the same uses, &c., as were declared by the original deed. For accomplishing this object it was necessary that two instruments should be prepared. By the first, the new trustee was nominated by the donee of the power, the old uses of the settlement were absolutely [\*652] revoked (the proviso, it was said, implying an \*authority for that purpose), and the use was appointed to A. and his heirs, and the estate and interest vested in the old trustees was assured unto and to the use of A. and his heirs, by way of conveyance. When this had been effected by one deed, and A. had become seised, or was supposed to have become seised, of the inheritance in fee-simple, he then, by conveyance, which was indorsed on the former deed, reconveyed the premises to the old and new trustees to the uses, trusts, &c., of the settlement, in the same manner as if the new trustee had been originally appointed. Thus, if the real intention was, that, on the appointment of a new trustee a seisin to serve the uses should be vested in the old and new trustees jointly, then a power of revocation was implied, and the direction was complied with. If the settlor had no such intention, then there was no implied power of revocation, and the affected exercise of it was a nullity, and the conveyance *by* the old trustee, and the reconveyance *to* the old and new trustees served only to pass the actual and vested interest. These notions are now treated as old fashioned, and the prevalent and better opinion is, that a simple conveyance

from the old trustee to the use of the old and new trustees will be sufficient (a).

[10. **New mode of vesting the trust property in new or continuing trustees.**—By the Conveyancing and Law of Property Act, 1881, sect. 34, a new and simple method of transferring trust property without conveyance or assignment has been introduced, which is now generally adopted where applicable. That section provides that, where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

It is to be observed that the declaration of vesting can only be \* made by the *deed by which a new* [\*653] *trustee is appointed*, and the section will not apply in cases where the appointment is made otherwise than by deed. The expression “the persons who by virtue of the deed become and are the trustees for performing the trust,” is not happily worded, but the intention of the legislature doubtless was to vest the trust property in the persons who immediately upon the execution of the deed of appointment are the trustees for performing the trust, and it is conceived that this intention is sufficiently expressed.]

11. **Stamps on appointment of new trustees.**—By 33 & 34 Vict. c. 97, the appointment of a new trustee requires a 10s.

(a) See Sugd. Powers, 884, note (1), 8th ed.; Davidson's Preced. vol. 3, p. 621, and vol. 4, 609, 2d ed.



*stamp*, and by s. 78 "every instrument and every *decree or order* of any Court, or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is *transferred* to or *vested* in any person, is chargeable with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee, is not to be charged with any higher duty than 10s." [But by sect. 8 "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each matter"; and accordingly where by an order of the Charity Commissioners new trustees were appointed of a charity, and a vesting order was also made, it was held that two duties of 10s. each were payable, one in respect of the appointment, and the other in respect of that part of the order which vested the trust estate in the new trustees (a). And on the same principle it would seem that a double duty is payable in the ordinary case of an appointment of new trustees by deed with a consequent transfer of the estate.

**12. Trustee retiring under recent Act without appointing a new trustee.** — Prior to the Conveyancing and Law of Property Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless the settlement contained a special power authorising him to do so, a circumstance which seldom occurred; but by sect. 32 of that Act it is enacted that —

(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have [\*654] retired from the trust, and shall, by the deed, \*be discharged therefrom under this Act, without any new trustee being appointed in his place.

[(a) *Hadgett v. The Commissioners of Inland Revenue*, 3 Ex. D. 46.]

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

The section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust; but it applies to trusts created either before or after the commencement of the Act.

By sect. 34, Where a deed by which a retiring trustee is discharged contains a declaration by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.]

**13. Trustee must see that the power contemplated the precise case.** — It must be carefully ascertained by the trustee that the circumstances under which he retires from the trust are precisely those which are contemplated in the terms of the proviso; for if the case be not warranted by the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office.

**14. Retiring trustee must see to completion of the appointment.** — And a trustee on retiring must [if a new trustee is to be substituted in his place] be careful not to part with the control of the fund before the new trustee has been actually appointed, for if he transfer it into the name of the intended new trustee and by some accident the appointment

fails to be completed, he still remains a trustee, and will be answerable for the trust fund (a).

If the old trustee obstinately and perversely, without any sufficient reason, *refuse* to transfer the fund to new [\*655] trustees duly \* appointed, he will be visited with the costs occasioned by his wilfulness (a).

15. It is somewhat surprising, considering the frequency of this power, how few questions until lately arose upon its construction.

In *Sharp v. Sharp* (b), heard in the Court of Queen's Bench, the terms in which the power was expressed were as follows:—“In case *either* of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts, it shall be lawful for the *survivors or survivor* of the trustees *so acting* in the trusts, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee.” Neither of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be new trustees; and the question was raised, whether the power of appointment had, under the circumstances, been effectually exercised, and it was determined in the negative. Lord Tenterden said that by the word “survivor” he understood merely the trustee “continuing to act”; for it was throughout the intention of the testator, that, in case of the death, or incapacity, or refusal of some *one* of the trustees, the *remaining trustee* who had been named by him and was the object of his confidence, should have the power of associating with himself some other person: but it would be giving a much larger construction to the words than they fairly imported, if the trustees, in the event of the whole class declining to act, were to nominate such other persons as they might think fit. Mr. Justice Bayley observed, that the word “either” was not uselessly introduced: that it was in effect a proviso that if *either* of the trustees named in the will should refuse to act, still that the

(a) *Pearce v. Pearce*, 22 Beav. 248.

(a) *Re Wise's Trust*, 3 I. R. Eq. 599.

(b) 2 B. & Ald. 405.

testator should have the benefit of the judgment of the other: that the testator might have had good reason for confining the power to the care of one trustee, for he might have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if the words were to be read as if they were "*both or either*," the case would be different; for if both the persons should decline to act, the testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a Court of equity: that under the words of the power the testator meant by the word "*acting*" to designate those who had taken upon themselves to perform some of \* the trusts [\*656] mentioned in the will, and that he did not contemplate one who *in limine refused to act*; that the word "*survivor*" must therefore mean the "*continuing*" trustee, as contradistinguished both from those who might refuse to act, and those who might be desirous to discontinue acting.

16. "*Refusing or declining*" includes "*disclaiming*." — If one trustee *disclaims*, may the continuing trustee appoint another, or do the words of the power, "if any trustee shall *refuse or decline*" apply, not to the case of a *disclaimer*, but only to a *refusal after having acted*? Although the point decided in *Sharp v. Sharp* was as stated above, yet from the language of the judges it appears that, had only one trustee disclaimed, the other might have exercised the power; and such, it is presumed, is clearly the rule where there is nothing to narrow the meaning of the words "*refusing or declining*." There generally follows in the power a direction that the estate "*vested in the trustee so refusing or declining*" shall be transferred to the new trustee; and hence it has been argued, that as no estate vests in a disclaiming trustee, the power did not contemplate such a case. However, there seems to be but little weight in the argument; for when it is said that the words "if any trustee shall *refuse or decline*" apply to disclaimer, it is not meant that they do not also apply to a subsequent refusal. At all events, therefore,

the direction for the transfer of the estate is not nugatory (*a*).

17. "Refusing" or "declining" means also after having acted. — On the other hand, it has been doubted whether the words "refusing" or "declining" may not refer exclusively to disclaimer, and have no application to the case of a trustee who, *after having accepted the trust, refuses* to act any longer in it. This proposition is also thought to be untenable (*b*), though some recent cases have an opposite tendency (*c*).

18. **Payment into Court is "declining."** — It has been held that a *payment of the trust money into Court*, under the Trustee Relief Act, stamps the trustee with the character of a "refusing or declining trustee" (*d*).

19. **Power to executors and administrators.** — If a power of appointing new trustees be given to a person, his executors and administrators, and the donee of the power dies, having appointed three executors, one of whom renounces, the *acting* executors can exercise the power (*e*).

[\*657] \* [20. **Limited administration for purpose of appointing new trustees.** — In a case in Ireland, where the power of appointing new trustees was given to the acting executors or administrators of the last surviving trustee, and the last surviving trustee was dead, but there was no legal personal representative of his estate, and the persons entitled to take out letters would not do so, the Court of Probate granted administration to the guardian of the infant *cestuis que trust*, limited to the purpose of appointing himself and A. B. new trustees of the settlement, and to the purpose of

(*a*) *Re Roche*, 1 Conn. & Laws. 306; *Walsh v. Gladstone*, 14 Sim. 2; *Mitchell v. Nixon*, 1 Ir. Eq. Rep. 155; *Crook v. Ingoldsby*, 2 Ir. Eq. Rep. 375; *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19.

(*b*) *Travis v. Illingworth*, 2 Dr. & Sm. 344.

(*c*) See *Re Woodgate's Settlement*, and *Re Armstrong's Settlement*, 5 W. R. 448.

(*d*) *Re Williams's Settlement*, 4 K. & J. 87.

(*e*) *Earl Granville v. McNeile*, 7 Hare, 156. The Reporter speaks of the third executor as "declining," but renunciation is meant, as assumed by the judgment, and expressly stated; 13 Jur. 252. It would seem, from the principle laid down by the Court, that, had the third executor declined only to act as executor without actual renunciation, the judge would have arrived at the same conclusion: and see *ante*, p. 202.

transferring to, and vesting in, such new trustees the trust funds (a).]

21. **Death of the trustee in the testator's lifetime.** — Suppose a testator to appoint two trustees with the *usual power of appointment* of new trustees, and a trustee *dies in the testator's lifetime*, can the surviving trustee appoint a new trustee? The late Vice Chancellor of England in one case expressed a doubt upon it (b), and in a subsequent case decided in the negative (c); but this was a narrow construction of the power, and it has since been ruled that a trustee who has survived the testator may appoint a new trustee in the place of one who predeceased the testator (d).

22. In *Morris v. Preston* (e), the proviso was, that “in case of the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living.” Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that, as the proviso clearly contemplated the case of *one* trustee \*surviving, an appointment of new trustees [\*658] after the decease of *both* the original trustees was not warranted by the power. The purchaser abandoned the objection at the hearing without argument — a circumstance

[a] *Re Jackson*, 7 L. R. Ir. 318.

[b] *Walsh v. Gladstone*, 14 Sim. 2.

[c] *Winter v. Rudge*, 15 Sim. 596.

[d] *Re Hadley*, 5 De G. & Sm.

67; *Nicholson v. Wright*, 26 L. J. N. S. Ch. 312. (S. C.) *nomine Nicholson v. Smith*, 3 Jur. N. S. 313; *Noble v. Meymott*, 14 Beav. 477. As regards

the statutory power conferred by 23 & 24 Vict. c. 145, s. 27, the doubt was guarded against by express enactment; see sect. 28; [as is also the case as regards the statutory power conferred by 44 & 45 Vict. c. 41, s. 31.]

(e) 7 Ves. 547.

much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject. However, the case as it stands has been said by the Lord Chancellor of Ireland to be of great authority—viz. in favour of the validity of the appointment (a).

23. **Power to tenant for life with the surviving or continuing trustee.**—In another case, where two trustees had been appointed by the settlement, and the power was, “that if either of the trustees should die, or reside beyond seas, or become incapable or *unfit to act* in the trusts, it should be lawful for the tenants for life, *together with the surviving or continuing or acting trustee for the time being*, to nominate a new trustee, and that *the trust estate should thereupon be vested in the newly appointed trustee, jointly with the surviving or continuing trustee*,” upon the trusts of the settlement; and one trustee died and the other became bankrupt; on the suggestion by counsel that there was *no surviving or continuing trustee*, and therefore the power was gone, the Lord Chancellor of Ireland observed, “That happens in many cases without the power being affected. The construction is not so straitlaced as all that” (b).

24. **Bankrupt trustee is “unfit.”**—It was ruled in the same case, that a trustee who became *bankrupt* was “unfit” within the words of the power. But if the power be worded “in case the trustee shall become *incapable* to act,” without the addition of the words “or unfit,” a bankrupt trustee is not within the description, for by “incapable” is meant *personal incapacity* and not pecuniary embarrassment (c). And a *bankrupt*, who has obtained a first-class *certificate*, [and has since the bankruptcy made a fresh start in life and has ceased to be impecunious,] cannot be regarded as unfit to be a trustee (d). [But the mere fact that the bankruptcy arose from misfortune, and not from any fault on the part of the bankrupt, does not remove his unfitness unless it can also be

(a) *Re Roche*, 1 Conn. & Laws. 106; *Turner v. Maule*, 15 Jur. 701; *Re East*, 8 L. R. Ch. App. 735.

(b) *Re Roche*, 1 Conn. & Laws. 306; 2 Dru. & War. 287.

(d) *Re Bridgman*, 1 Dr. & Sm. 164.

(c) *Re Watt's Settlement*, 9 Hare,

shown that since his bankruptcy he has become a person of means (e).]

25. **Trustee resident abroad.**—The court held in one case that a trustee who went to reside permanently *abroad*, came within the description of a trustee "*incapable to act*" (f), but this seems scarcely in harmony with \* correct principle (residence abroad being rather a [\*659] question of unfitness than incapacity), and cannot be reconciled with other authorities (a). And the Court has since intimated an opinion that incapacity means *personal* incapacity (b).

26. "**Unable**" to act.—If the power provide that if any one of three trustees become "unable" to act, "The *trustees or trustee for the time being*, whether continuing or declining to act," may appoint a new trustee, the two trustees who remain capable can appoint a new trustee in the place of a lunatic trustee (c).

27. **Temporary absence.**—If the settlement provide that a trustee shall cease to be such "on *departing the United Kingdom* from whatever cause or motive or under whatever circumstances," the clause nevertheless does not apply to a mere *temporary absence* with the intention of returning (d).

28. **Two trustees retiring, and appointing a single successor.**—If there be *two trustees* of a settlement, and both be anxious to retire from the trust at one and the same time, they would not be justified in putting the property under the control of a *single trustee* appointed in their *joint places* (e).<sup>1</sup>

[(e) *Re Adams' Trust*, 12 Ch. D. 634; and see *Re Barker's Trust*, 1 Ch. D. 43; *Re Hopkins*, 19 Ch. D. 61.]

(f) *Mennard v. Welford*, 1 Sm. & G. 426; S. C. 1 Eq. Rep. 237; and see *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.

(a) *Withington v. Withington*, 16 Sim. 104; *Re Harrison's Trusts*, 22

L. J. N. S. Ch. 89; and see *Re Watt's Settlement*, 9 Hare, 106; *O'Reilly v. Alderson*, 8 Hare, 104.

(b) *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.

(c) *Re East*, 8 L. R. Ch. App. 735.

(d) *Re Moravian Society*, 26 Beav. 101.

(e) *Hulme v. Hulme*, 2 M. & K. 682.

<sup>1</sup> Where two or more trustees have power to appoint their successors, they should appoint as many as retire, and not one only; *Mass. Hospital v. Amory*, 12 Pick. 445; yet this will depend largely upon the nature of, and the latitude given in, the power. A different member may be chosen when all interested parties assent to it; *Greene v. Borland*, 4 Met. 330; see also *Hammond v. Granger*, 128 Mass. 272; *Att'y Gen. v. Barbour*, 121 Mass. 568.



29. **Single trustee retiring and appointing two to succeed.** — And, *vice versa*, [until the recent Act, a *single* trustee, had he wished to retire, could not have appointed] *more than a single trustee* in his place; for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet he ought not to clog the estate with unnecessary machinery. The idea of the settlor may have been, that by increasing the number of the trustees the vigilance of each, individually, would be diminished. “A great number,” observed Lord Mansfield, “may not do business better than a smaller, and it would be attended with more expense” (*f*). [But now by the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed in the instrument creating the trust, the number of trustees may, on the appointment of a new trustee, be increased, and the section applies to trusts created either before or after the commencement of the Act (*g*).

30. Independently of the recent Act] the power may be so specially worded as to authorise the substitution [\*660] of *several* trustees \* in the place of *one* or of *one* in the place of *several*. Thus, where a testator appointed two trustees, and directed “that if the trustees thereby appointed, or to be appointed as thereafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee *or trustees* for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint *one or more person or persons* to be a trustee *or trustees* in the room of the trustee or trustees so dying, &c., and thereupon the trust estates should be vested in the new trustee *or trustees*, jointly with the surviving or continuing trustee *or trustees*, or *solely*, as occasion should require,” and the surviving trustee appointed *two* trustees in the room of the deceased trustee, the late Vice Chancellor of England held that such a case was immediately contemplated by the proviso (*a*).

(*f*) *Rex v. Lexdale*, 1 Burr. 448; *Ex parte Davis*, 2 Y. & C. C. C. 468; 3 Mont. D. & De G. 304; and see *Re Breary*, W. N. 1873, p. 48.

[(*g*) 44 & 45 Vict. c. 41, s. 31.]

(*a*) *D’Almaine v. Anderson*, V. C., Feb. 1, 1841, MS.; and in *Meinertzhagen v. Davis*, 1 Coll. 335, the special form of the power was held to authorise the appointment of three trustees in

## [\*31. Reduction in number of trustees authorised. — [\*661]

So where a testator appointed four trustees and declared that "as often as his first or future trustees or any of

the place of two; and in *Emmet v. Clarke*, 3 Giff. 32, three trustees were held to have been well appointed in the place of four; and in *Hillman v. Westwood*, 3 Eq. Rep. 142, the Court thought that two trustees could be appointed in the place of one. In another case, not reported, the proviso was that "In case any of the several trustees therein named, or any new trustee or trustees to be appointed as thereafter mentioned, should depart this life, or be desirous to be discharged from the execution of the aforesaid trusts, or should reside abroad or become incapable, or neglect or refuse to act in the trusts of the testator's will before the same should be fully performed, it should be lawful for the remaining surviving or only acting trustee or trustees, and he the said testator did thereby authorise him or them, by any instrument or instruments under his or their hand and seal, to be attested by two or more credible witnesses, to nominate and appoint any other fit person to supply the place of the one so dying or desiring to be discharged, residing abroad, or neglecting or refusing to act thereunder; and thereupon on the happening of any of those events he or they should immediately cease to be such trustee as aforesaid, and be immediately released and discharged from such office; and when and as soon as any such new trustee or trustees should be so nominated, substituted and appointed as aforesaid, all and singular the trust monies, stocks, funds, and securities, messuages, lands, tenements, and hereditaments in or upon which the same or any part thereof should or might for the time being be invested, should immediately vest in him or them, or the same should with all convenient speed be assigned,

conveyed, and assured so that the same should become vested in such surviving and continuing and such new trustees, or such new trustees or trustee only as the case might require, and his or their heirs, executors, administrators, and assigns, in the same manner, and with the same powers, authorities, and directions as if he or they had been originally appointed under that his will." There were five trustees, Elizabeth Byrom, Ashton Johnson Byrom, Valentine Byrom, William Corrie, and George Orred. V. Byrom, A. J. Byrom, and G. Orred died, and in March, 1831, Elizabeth Byrom and W. Corrie appointed Henry Byrom in the place of V. Byrom, A. J. Byrom and G. Orred. In July, 1831, William Corrie died, and in May, 1833, Elizabeth Byrom died, and on June 4, 1833, Henry Byrom appointed Emma Byrom in the place of Elizabeth Byrom. On June 6, 1833, Emma Byrom, as the remaining trustee, appointed Peter Ainsworth, Thomas Shaw Brandreth, and Edgar Corrie, in the place of Henry Byrom (then retiring), and of the said A. J. Byrom, V. Byrom, and George Orred, deceased. In an amicable suit between *cestuis que trust* and trustees for trying the validity of the appointments, it was declared by V. C. Wigram, "that the appointment of the defendants Emma Byrom, Peter Ainsworth, Thomas Shaw Brandreth, and Edgar Corrie respectively to be trustees under the will of Ashton Byrom, deceased, in the pleadings named, was valid and proper, and duly authorised by the power of appointing new trustees contained in the said will." *Corrie v. Byrom*, V. C. Wigram, 26 April, 1845, M. S.; and see *Re Breary*, W. N. 1873, p. 48.

them should die, &c., he empowered the surviving or continuing trustees or trustee, or if there should be no such trustee, then the retiring or renouncing trustees or trustee, and if there should be no such last mentioned trustees then the executors or administrators of the last deceased trustee; by any deed to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, &c.; and upon the appointment of every such new trustee all the trust estates, monies and premises should be thereupon vested in such *new trustee* or trustees either *solely* or jointly with the surviving or continuing trustee or trustees, as occasion should require;" and two of the trustees died and one renounced, and the surviving trustee appointed a single co-trustee, the M. R. said "he was not aware of any rule making it compulsory on the donees of a power appointing new trustees to keep up the full number of trustees except in the case of a charity. If the testator wished the number to be kept up, he must expressly say so. In that case it was clear from the words of the will that the testator contemplated the possibility of a single trustee acting alone." And he held that the appointment was valid(*a*). So where one trustee disclaimed, and the other retired, the appointment of a single trustee under the power in Lord Cranworth's Act was supported (*b*).]

32. **Court does not limit itself to original number.** — And where the Court itself is appointing new trustees, it does not at the present day, though doubts appear to have been formerly felt on the point (*c*), consider itself bound to fill up the precise number only mentioned in the instrument of trusts. It has added two new trustees to the two original trustees (*d*), appointed four where the testator originally appointed three (*e*), three where the testator originally appointed two (*f*), and two where the testator originally

[*(a)* Cunningham and Bradley's Contract for sale to Wilson, W. N. 1877, p. 258; *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138.]

[*(b)* *West of England and South*

*Wales District Bank v. Murch*, 23 Ch. D. 138.]

[*(c)* *Devey v. Peace*, Taml. 78.

[*(d)* *Re Boycott*, 5 W. R. 15.

[*(e)* *Plenty v. West*, 16 Beav. 356.

[*(f)* *Birch v. Cropper*, 2 De G. & Sm. 255.

appointed one (*g*). In these cases the number \* has [\*662] been increased, but if the original number was excessive the Court may also reduce it. If, however, two were originally appointed, the Court for security will not, at least where money is concerned, substitute one only (*a*).

33. **Trustee should be within the jurisdiction.** — In general the new trustees appointed under a power should be persons amenable to the *jurisdiction of the Court*, but where the personal property of a lady was settled on her marriage with a foreigner, whose domicile was in *America* at the time of the marriage, the subsequent appointment of three *Americans* to be trustees was decided to be justifiable (*b*). But though the parties who have a *power of appointment* may exercise it in this way, the *Court* in substituting trustees by its own jurisdiction has refused to appoint new trustees who are *out of the jurisdiction* (*c*). [However, in a recent case where all the parties interested were of age, and they were all resident either in Australia or New Zealand, the Court appointed two persons resident in Australia new trustees of a settlement (*d*), and the same course has been adopted in other cases where some of the *cestuis que trust* have been infants (*e*).]

34. **One of two trustees retiring and appointment of the co-trustee.** — Should *one* of two trustees be desirous of retiring, of course he cannot do so without the *substitution of another* in his place (*f*), and the power of appointment of new trustees would not authorize the appointment of the *continuing trustee as sole* administrator of the trust (*g*); for this would, in effect, amount to a relinquishment of the trust without the appointment of any successor (*h*).

(*g*) *Plenty v. West*, 16 Beav. 356; *Re Tunstall's Will*, 4 De G. & Sm. 421.

(*a*) *Re Ellison's Trusts*, 2 Jur. N. S. 62; *Porter's Trust*, 2 Jur. N. S. 349; and see *Re Roberts*, 9 W. R. 758.

(*b*) *Meinertzhagen v. Davis*, 1 Coll. 335; [and see *Re Smith's Trusts*, 20 W. R. 695; *Re Cunard's Trusts*, 48 L. J. N. S. Ch. 192; 27 W. R. 52; but see *Re Long's Settlement*, 17 W. R.

218; *Re Austen's Settlement*, 38 L. T. N. S. 601.]

(*c*) *Guibert's Trust*, 16 Jur. 852.

[(*d*) *Re Drewe's Settlement Trusts*, W. N. 1876, p. 168.]

[(*e*) *Re Liddiard*, 14 Ch. D. 310; and see the cases cited in note (*b*).]

(*f*) *Adams v. Paynter*, 1 Coll. 532.

(*g*) *Wilkinson v. Parry*, 4 Russ. 272; see *post*, p. 671.

(*h*) *Attorney-General v. Pearson*, 3 Mer. 412, *per* Lord Eldon.

35. **Appointment of one trustee in the place of several.** — [Independently of the power conferred by the recent Act (*i*),] a *surviving trustee* cannot be advised (though it has been sometimes done), to vest the trust estate in himself, and a new trustee appointed in the place of *one of several deceased trustees*, but should refuse to part with the property unless the original number of trustees be restored. Still less could the *representative* of the last surviving trustee be advised to vest the property in a *single new trustee* nominated in the place of one only of the several *deceased trustees*. And where a settlement constitutes *three trustees* with a power of appointment of new trustees in the usual form, [\*663] \*and two die, the *survivor* should refuse to retire in favour of a *single new trustee* appointed in his place, for, as the original settlement provided three trustees to execute the trust, the donee of the power should not execute the power partially, but should restore the original number (*a*). In a trust for *sale*, if this precaution were not observed, a purchaser on a sale by the new trustee might give trouble by objecting to the title (*b*). The strongest ground for supporting the sale would be, that probably many titles depend on the validity of such an execution of the power, and in recent cases, the appointment has been supported (*c*). *Fieri non debuit, factum valet*. Where the power in the will was “to appoint *one or more* new trustee or trustees in the room of the *trustee or trustees* so dying,” and both trustees died, and the donee of the power appointed a single trustee in the place of both, the appointment was established (*d*).

[36. 44 & 45 Vict. c. 41. — Now, by the Conveyancing and Law of Property Act, 1881 (*e*), sect. 31, sub-sect. (3), on an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee

[(*i*) 44 & 45 Vict. c. 41, s. 31.]

(*a*) See *Barnes v. Addy*, 9 L. R. Ch. App. 244; but see *Forster v. Abraham*, 17 L. R. Eq. 351.

(*b*) See *Earl of Lonsdale v. Beckett*, 4 De G. & Sm. 73; *Meinertzhagen v. Davis*, 1 Coll. 344.

(*c*) *Re Pool Bathurst's Estate*, 2 Sm. & G. 169; *Reid v. Reid*, 30 Beav. 388; and see *Re Fagg's Trust*, 19 L. J. N. S. Ch. 175.

(*d*) *Wood v. Ord*, M. R. 1st July, 1793, MS.

[(*e*) 44 & 45 Vict. c. 41.]

was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.]

**37. Rectification of bad appointment.** — If A. and B. be trustees, with a power of appointment of new trustees limited to “the acting trustees or trustee, or the executors or administrators of the surviving trustee,” and then A. dies, and B. retires and appoints C. a trustee in his *own* place, and afterwards dies and appoints an executor, who as the donee of the power for the time being appoints C. and D. in the place of A. and B., the two new trustees are properly appointed, and can sign receipts; for either the original appointment of C. was good, and the subsequent appointment of D. [having been made with the concurrence of C.] filled up the number, or the original appointment of C. was invalid, and then the appointment of both C. and D. by the donee of the power was effectual (*f*).

**[38. Concurrence of retiring trustee not necessary.** — Where the power of appointing new trustees is given to the surviving or continuing trustees or trustee, and a trustee retires, \* his concurrence is not necessary in the ap- [\*664] pointment of a new trustee in his place, but such appointment rests with the other trustees or trustee who do not retire (*a*).]

**39. A surviving trustee appointing two trustees in the place of himself and the deceased trustee.** — It sometimes happens where the power of appointment of new trustees is limited to the “*surviving* or *continuing* trustee,” that one trustee *dies*, and then the other wishing to retire proposes to appoint two new trustees at the same time in the place of himself and the deceased trustee. A doubt has, however, been suggested whether the word *surviving* must not be read as applicable only to an appointment in the room of a *deceased* trustee;

(*f*) *Miller v. Priddon*, 1 De G. M. & G. 335. *Travis v. Illingworth*, 2 Dr. & Sm. 344; but see *Re Glenn* and *Hartley*, 25 [(*a*) *Re Norris*, 27 Ch. D. 333; Ch. D. 611.]

and, as the word *continuing* cannot include *retiring*, the safer course is for the *surviving* trustee first to appoint a person in the room of the deceased trustee, and then the person so substituted may, as the *continuing* trustee, appoint a new trustee in the place of the trustee desirous of retiring (*b*).

40. **Case of both trustees wishing to retire.** — And if there be *two* trustees, and a power of appointing new trustees be given to “the surviving or continuing trustees or trustee,” it has been held that they cannot both *retire* at the same time, but that there must be two successive appointments, as in the case last mentioned (*c*); and if there be *three* trustees with the like power and *two* die, and the surviving trustee wishes to retire, then he is not a *continuing* trustee, and therefore he cannot retire and appoint two others in the place of *himself* and a deceased trustee (*d*).

[But under the Conveyancing and Law of Property Act, 1881, the provisions of the Act relative to the appointment of new trustees by a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of those provisions (*e*); and a retiring trustee can, accordingly, under the Act appoint new trustees in the place of himself and a deceased trustee, or in the place of himself alone if he was originally the sole trustee.]

[\*665] \*41. **Power to “other trustee.”** — Where four trustees were appointed originally, and the power was to the surviving or continuing or *other* trustee to appoint, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words “other

(*b*) See *Nicholson v. Wright*, 26 L. J. N. S. Ch. 312; S. C. *nom.* *Nicholson v. Smith*, 3 Jur. N. S. 313. But see *Pell v. De Winton*, 2 De G. & J. 17.

(*c*) *Stones v. Rowton*, 17 Beav. 308; S. C. 1 Eq. Rep. 427.

(*d*) *Travis v. Illingworth*, 2 Dr. & Sm. 344; [*Re Norris*, 27 Ch. D. 333. *Travis v. Illingworth*, has been directly called in question by V. C. Bacon in the recent case of *Re Glenny and Hartley*, 25 Ch. D. 611, in which the V. C. expressed his opinion that the retiring trustees could execute the

power. It is, however, to be observed that the power in that case contained special words, showing that the words “continuing trustees” were not used in their strict sense, but as including trustees who were being discharged, and on the general question the argument of the V. C. does not seem to be so well founded as that of V. C. Kindersley in *Travis v. Illingworth*, and has since been disproved of, *Re Norris*, *ubi supra*.]

[(*e*) 44 & 45 Vict. c. 41, s. 31, sub-s. (6).]

trustee," appoint four new trustees in the place of himself and three other (a).

42. **Power to "acting trustees."** — Where persons are nominated trustees in a will, and a power of appointing new trustees is given to the "acting" trustees, should all the trustees disclaim, the power of appointment is gone, and the *hiatus* in the trust can only be filled up by the Court. It has, occasionally, been suggested that the trustees, instead of disclaiming, should accept the trust to the extent of exercising the power only, and should, by virtue of it, appoint new trustees (b); but it is conceived that trustees who availed themselves of the office for the purpose only of introducing other parties into the trust would be rather "refusing" than "acting" trustees, and that the exercise of the power, under such circumstances, would be nugatory, and might involve the outgoing trustees in serious liabilities.

43. **Power to the "said trustees."** — The power of appointment is sometimes given "to the *said trustees*," and then the question arises whether a sole survivor can appoint. It is conceived that "the said trustees" means the persons or person representing the trust for the time being under the settlement, and that the survivor can therefore exercise the power.

44. **Appointment of a *cestui que trust* or near relative of *cestui que trust* as trustee.** — On a change of trustees it is not uncommonly proposed to appoint one of the *cestuis que trust* to that office, but such an arrangement is evidently irregular, as each *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person whose interest would not tend to bias him from the line of his duty. Should proceedings be instituted for the removal of the *cestui que trust*, and the substitution of some indifferent person as trustee, the costs might be thrown upon the parties who had improperly filled up the trust (c). But it is presumed that this rule affects the parties to the

(a) *Lord Camoys v. Best*, 19 Beav. 414. 67, where power was expressly given to a declining trustee.

(b) See *Sharp v. Sharp*, 2 B. & Ald. 415; and *Re Hadley*, 5 De G. & Sm. 424.

(c) See *Passingham v. Sherborn*, 9 Beav. 424.



trust only, and that if a *cestui que trust* who has been appointed a trustee sell real estate under a power of sale, he may sign a receipt, and that the purchaser is not bound to look to the proper exercise of the discretion in such a case (*d*). *Cestuis que trust* are not absolutely *incapacitated* from being trustees, as the Court itself under special [\*666] \*circumstances appoints a *cestui que trust* a trustee (*a*). The question is merely one of relative fitness. *A fortiori*, the circumstance of near *relationship* to the *cestui que trust* creates no absolute disqualification for the office of trustee, though Sir John Romilly, M. R., objected, where it could be avoided, to appoint relatives as trustees (*b*).

[45. **Appointment of tenant for life.**—The Court will not appoint the tenant for life (*c*), or the solicitor of the tenant for life (*d*), to be a trustee for the purposes of the Settled Land Act, 1882; and has even refused to appoint two brothers trustees, and required two *independent* persons to be appointed (*e*).]

46. **Whether donee of power can appoint himself trustee.**—The question is often asked, whether the donee of the power can appoint himself a trustee, and, as no one can be judge in his own case, such an appointment would be open to objection (*f*). Should the execution of the trust have been committed to trustees and the survivor of them, his *executors and administrators*, and the trustees die, and the power of appointment is in the executor of the survivor, here it may be said that as by the terms of the trust the executor was declared to be a proper person to execute the trust, the executor has the settlor's warrant for the appointment of *himself* and another. It may still, however, be observed, that the exercise of every power should be regulated by the circum-

(*d*) See *Reid v. Reid*, 30 Beav. 388; *Forster v. Abraham*, 17 L. R. Eq. 351.

(*a*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Forster v. Abraham*, 17 L. R. Eq. 351.

(*b*) *Wilding v. Bolder*, 21 Beav. 222; and see *ante*, p. 41.

[(*c*) *Re Harrop's Trusts*, 24 Ch. D. 717.]

[(*d*) *Re Kemp's Settled Estates*, 24 Ch. D. 485.]

[(*e*) *Re Knowles' Settled Estates*, 27 Ch. D. 707.]

(*f*) See *ante*, p. 316.

stances as they stand at the time, and that the limitation to executors *à priori* cannot dispense with the discretion to be applied afterwards.

47. *Of severing a trusteeship.*—Where estates of a different description, or held under a different title, or limited upon different trusts, have been vested in the same trustees by the settlor, and there is a single power of appointment of new trustees in the usual form, it [was at one time thought] that there was no authority for afterwards dividing the trust by the appointment of one set of new trustees to execute the trusts of the one estate, and a distinct set of new trustees to execute the trusts of the other (*g*); and it [was even held in one case] upon a petition under the Trustee Acts, that the Court had no jurisdiction to make such an order (*h*). [But where \*there was no opposition to [\*667] the order, the Court in several subsequent cases appointed new trustees under the Trustee Acts of one of several trusts held under the same instrument without dealing with the other funds (*a*); and in an administration action it was held by Fry, J., that the Court had jurisdiction to appoint separate sets of trustees (*b*). Now, by the Conveyancing Act, 1882 (*c*), it is enacted, that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and this section applies to trusts created either before or after the commencement of the Act.

It is conceived that if a trustee desire to retire from the trusteeship so far as it relates to a particular part of the trust property, and to continue a trustee as to the other parts held on distinct trusts, the intention may be effected under this section by the appointment of a new trustee or new trustees

(*g*) See *Cole v. Wade*, 16 Ves. 27; *Re Anderson*, L. & G. t. Sugd. 29.

(*h*) *Re Dennis's Trusts*, 12 W. R. 575; 3 N. R. 636.

[(*a*) *Re Cottrell's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48

L. J. N. S. Ch. 192; 27 W. R. 52, and the cases there cited.]

[(*b*) *Re Grange*, 29 W. R. 502; 44 L. T. N. S. 469.]

[(*c*) 45 & 46 Vic. c. 39, s. 5.]

of the particular part, and constituting a separate trusteeship for that part. So if the continuing trustee desire to remain a trustee as to the whole trust property, but to appoint new trustees to act with himself so far only as relates to a particular part held on separate trusts, the object may be effected under this section (*d*).]

48. **Directory powers.**—The proviso is sometimes of such a directory character as to authorise the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclusively. Thus, where six trustees were empowered, *when reduced to three*, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment (*e*). So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect (*f*). It should be observed that these were cases of *charitable* trusts, in which a greater latitude of construction is allowed than in ordinary trusts (*g*).

[\*668] \*49. **Tenant for life disposing of his life estate.**—If a tenant for life has a *power* of appointing new trustees and *sells his life interest*, the power [is not thereby destroyed, but is still exercisable with the consent of the person to whom the beneficial interest has been aliened (*a*). So if the tenant for life] has only *mortgaged* his life interest, he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power, if it be done with the consent of the mortgagee.

[It has recently been held (*b*) that the power is exercisable

[(*d*) *Re Paine's Trust*, 28 Ch. D 725.]

(*e*) *Attorney-General v. Floyer*, 2 Vern. 748; and see *Attorney-General v. Bishop of Lichfield*, 5 Ves. 825; but see *Foley v. Wontner*, 2 J. & W. 245.

(*f*) *Doe v. Roe*, 1 Anst. 86.

(*g*) See *ante*, p. 601.

(*a*) *Alexander v. Mills*, 6 L. R. Ch.

App. 124. See *Holdsworth v. Goose*, 29 Beav. 111, and cases cited *Ib.*; *Nelson v. Seaman*, 1 De G. F. & J. 368; *Lord Leigh v. Ashburton*, 11 Beav. 470; *Eisdell v. Hammersley*, 31 Beav. 255; *Walmesly v. Butterworth*, Coote on Mortgages, App. 3d Ed. p. 572; *Warburton v. Farn*, 16 Sim. 625.

[(*b*) *Hardaker v. Moorhouse*, 26 Ch. D. 417.]

by the tenant for life, even without the consent of the alienee, but it is submitted that this must be subject to the implied condition that there is nothing in the appointment prejudicial to the interest of the alienee. This condition has been expressly recognised in several of the earlier cases (*c*), and is in accordance with sound principle; and it is conceived that, notwithstanding the recent case of *Hardaker v. Moorhouse*, it will be the wiser course to procure the consent of the alienee to the appointment.]

**50. Trustee cannot retire in consideration of a premium, or in favour of another who intends to commit a breach of trust.** — Advantage cannot be taken of the power for the purposes of profit; and therefore if the donee of the power appoint a person a trustee in consideration of *a sum of money* paid by him for the office, the appointment cannot stand (*d*). And if a trustee refuse, when solicited, to commit a breach of trust himself, but declares his willingness to resign in favour of some other person less scrupulous, the Court, acting upon the principle of *qui facit per alium facit per se*, will hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted (*e*). And upon principle it would seem that a bond of indemnity given to the retiring trustee would be a very doubtful security against the consequences of the act, for the bond itself if found to be infected with fraud could afford no just ground for action (*f*). However, in a recent case, it was held by the Court of Exchequer that the common law Courts have no such cognisance of breaches of \*trust as to treat a bond of indemnity [\*669] against an act amounting in equity to a breach of trust as necessarily containing anything *illegal* (*a*).

**51. Improper appointment by donee of power.** — If a tenant for life, with the power of appointment of new trustees,

[*(c)* *Alexander v. Mills*, 6 L. Ch. App. 124; *Holdsworth v. Goose*, 29 Beav. 111; *Eisdell v. Hammersley*, 31 Beav. 255; and see *Re Cooper*, 27 Ch. D. 565; and cf. 45 & 46 Vict. c. 38, s. 60.]

[*(d)* *Sugden v. Crossland*, 3 Sm. & G. 192.

[*(e)* *Norton v. Pritchard*, Reg. Lib.

B. 1844, 771; *Le Hunt v. Webster*, 8 W. R. 434; reversed 9 W. R. 918; *Clark v. Hoskins*, 36 L. J. N. S. Ch. 689; *Palairot v. Carew*, 32 Beav. 567.

[*(f)* See *Shep. Touch.* 132, 371.

[*(a)* *Warwick v. Richardson*, 10 M. & W. 284; and see *Lord Newborough v. Schröder*, 7 C. B. 342; *Dugdale v. Lovering*, 10 L. R. C. P. 196.

*appoint improper persons* to the trust, he will be personally liable for the costs of a suit for removing the objectionable trustees (*b*).

52. **Result where a new trustee is ineffectually appointed.**— If a new trustee be *ineffectually appointed*, the old trustees may exercise the powers given to them by the instrument of trust, notwithstanding the ineffectual attempt (*c*). But if a trustee retire upon the appointment of a new trustee, and from want of the proper formalities being observed the appointment is not legal, the old trustee cannot lie by for a long interval and then exercise a power by mere concurrence in the deed, without *bonâ fide* exercising his own judgment and discretion (*d*).

53. **Lis pendens.**— If the *administration of the trust* be in the hands of the *Court*, the donee of the power cannot exercise it without having first obtained the Court's approbation of the person proposed (*e*). However, if the old trustees do appoint without the leave of the Court, the act is not to be considered as altogether void in itself, but it puts the burthen upon them of proving, and that by the strictest evidence, that what was done was perfectly right; and also saddles them with the costs of that proof. If the act was not proper, of course the appointment will be cancelled (*f*).

54. **How the costs are to be borne.**— On the appointment of a new trustee under a power, the *costs* fall on the *corpus* of the trust estate. In strictness the costs of appointing new trustees should be governed by the same principles as the payment of fines on admission to copyholds (*g*). But on the appointment of new trustees by the Court the costs are always thrown upon the estate, and the practice in Court regulates the practice out of Court (*h*). Where there is no

(*b*) *Raikes v. Raikes*, 32 Beav. 403.

(*c*) *Warburton v. Sandys*, 14 Sim. 622; *Miller v. Priddon*, 1 De G. M. & G. 335.

(*d*) *Lancashire v. Lancashire*, 2 Ph. 657; 1 De G. & Sm. 288.

(*e*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General v. Clack*, 1 Beav. 467; *Peatfield v. Benn*, 17 Beav. 552; *Middleton v. Reay*, 7 Hare,

106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399; [*Re Gadd*, 23 Ch. D. 134; and see *ante*, p. 617.]

(*f*) *Attorney-General v. Clack*, 1 Beav. 473, *per* Lord Langdale; and see *Cafe v. Bent*, 3 Hare, 249.

(*g*) See *ante*, p. 379.

(*h*) *Palmer's Settlement*, V. C. Kindersley, 18 April, 1857; *Carter v. Sebright*, 26 Beav. 376; see *post*, p. 672.

fund readily available the costs are often paid by the tenant for life.

55. **Inrolment in case of charity.**— On the appointment of new trustees of a *charity*, the \*conveyance [\*670] of real estate which is already in mortmain need not be *inrolled* (a).

56. **Powers of new trustees.**— Where new trustees are appointed under a power, it is presumed that they can exercise all the *powers* given to the *original trustees* in that character; but in penning a power of appointment of new trustees, all questions should be obviated by an express direction that the new trustees shall have the same powers as if originally appointed (b).

57. **Attested Copies.**— A trustee upon transferring the trust estate to a newly appointed trustee is not allowed to charge it with the expense of an *attested copy* of the settlement where he has already an ordinary copy, or with the expense of a *duplicate* of the deed of new appointment, though he is entitled to an examined copy of it. The *extra* evidence is considered as incurred for the satisfaction of the trustee from an excess of caution, and, if required, must be paid for by himself (c).

58. **Inquiries to be made by incoming trustee.**— If newly appointed trustees *omit to inquire of a retiring trustee* whether he has notice of any charge, and then having no notice, they distribute the fund to the prejudice of the incumbrancer, they will not be liable to him on the ground that it was their duty to have made inquiry of the retiring trustee, in which case they would have known of the incumbrance (d).

[59. Under sect. 5 of 22 & 23 Vict. c. 61, the Court has jurisdiction where a final decree of nullity of marriage or dissolution of marriage has been made to extinguish or vary

(a) *Ashton v. Jones*, 28 Beav. 460; and see *Shelf. Mortm.* 130.

[(b) In appointments under the statutory powers this is expressly provided for; 23 & 24 Vict. c. 145, s. 27; 44 & 45 Vict. c. 41, s. 31.]

(c) *Warter v. Anderson*, 11 Hare, 301; S. C. 1 Eq. Rep. 266.

(d) *Phipps v. Lovegrove*, 16 L. R. Eq. 80.

the power of appointing new trustees of the settlements made by the parties to the marriage (e).]

*Thirdly.* Of the discharge of the trustee by the authority of the Court.

1. **Suit to be discharged from the trust.** — The trustee may, in every proper case, although the contrary appears to have been at one time supposed (f), get himself discharged from the office on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements, or the donee of the power either cannot or will not exercise it, and were there no means by which a [\*671] trustee could ever denude \*himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task.

2. **Where no new trustee can be found.** — Where *no new trustee can be found* willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. "It is a mistake," observed Lord St. Leonards, "to suppose that a trustee who is *entitled to be discharged* is bound to show to the Court that another person is ready to accept the office; the Court will at once refer it to the Master to appoint a new trustee. But if no one can be found who will accept the trust, the Court may find itself obliged to keep the old trustee before the Court, but will take care to protect him in the meantime" (a). This was said in a case where the trustee, from the conduct of the *cestui que trust*, could claim to be discharged; but if a trustee wish to retire from mere *caprice*, it is not clear that the Court can or will discharge him, unless another trustee can be found in substitution (b). It is certain that the Court cannot divest him of the *estate* before some one can be found to take it, and even as to the *office* it is not unreasonable, that if a man once engages to undertake it, he shall not retire from it without any reason, and so leave the estate without a trustee.

[(e) *Oppenheim v. Oppenheim*, 9 P. D. 60; *Maudslay v. Maudslay*, 2 P. D. 250.]

& Lat. 533; and see *Forshaw v. Higginson*, 20 Beav. 487.

(f) *Hamilton v. Fry*, 2 Moll. 458.

(b) *Ardill v. Savage*, 1 Ir. Eq. Rep. 79.

(a) *Courtenay v. Courtenay*, 3 Jon.

tee. But every trustee may relieve himself from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the Court (*c*). In a case where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court, under the Trustee Acts, appointed the two continuing trustees to be the sole trustees (*d*); [but in similar cases the Court now refuses to make the order, and requires a new trustee to be appointed, unless the whole of the fund is immediately divisible (*e*).]

3. **How application to be discharged from the trust should be made.** — Formerly the application to the Court to be discharged from the trust was in general made by *bill*, in order to give the Court an \*opportunity of exam- [\*672]ining into the merits of the case (*a*); but if a suit were already pending, the trustee might then solicit his dismissal by *petition* or *motion* (*b*). It was formerly not the custom of the Court to look through the proceedings, but a reference was ordered to the Master (*c*). Under the present practice the Court, except in cases of special difficulty, usually appoints a trustee without a reference to chambers, and without a suit, under the provisions of the Trustee Acts.

4. **Part of the trust estate lost.** — If part of the original trust estate is *supposed to be lost*, or is *not forthcoming*, the Court will not appoint new trustees of the *residue*, so as to make them *partial trustees* only, but will appoint them *trustees*.

(*c*) See *Forshaw v. Higginson*, 20 Beav. 485; *Gardiner v. Downes*, 22 Beav. 397.

(*d*) *Re Stokes' Trusts*, 13 L. R. Eq. 333. [The order in this case was prefaced thus, "A. and B. by their counsel desiring to retire, &c., in order that A. and B. may be appointed to act alone as trustees, &c." See *Seton on Decrees*, 4th ed. p. 540; and this case was followed in *Re Tatham's Trust*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Shipperdson*, W. N. 1880, p. 155; *Re*

*Northrop*, W. N. 1880, p. 184; but since the contrary decisions in *Re Colyer*, 50 L. J. N. S. Ch. 79; and *Re Aston*, 23 Ch. D. 217, a similar order is not likely to be made; *Re Lamb's Trusts*, 28 Ch. D. 77.]

[(*e*) See cases in last note, and *Re Martyn*, 26 Ch. D. 745.]

(*a*) See *Ex parte Anderson*, 5 Ves. 243; *Re Fitzgerald*, L. J. & G. t. Sugd. 22; *Re Anderson*, *Ib.* 29.

(*b*) — *v. Osborne*, 6 Ves. 455; — *v. Robarts*, 1 J. & W. 251.

(*c*) — *v. Osborne*, 6 Ves. 455.



*tees generally*; and, if required, will at the same time, for the protection of the trustees, direct an inquiry whether any part of the trust fund has been lost, and what steps should be taken for its recovery (*d*).

5. **Costs.** — The *costs* where the trustee retires from *ca-price* or *without sufficient reason* must be borne by himself (*e*); but where he retires from necessity, or on good and sufficient ground, they will be thrown upon the trust estate (*f*). Where the trust was originally a simple one, but has become embarrassing from its complications, the trustee may commence an action to be relieved, and will be allowed his costs, for although he might have paid the trust fund into Court under the Trustee Relief Act, this would not have saved him from being sued, except as to the particular sum paid into Court (*g*).

6. **Application by representative of deceased trustee.** — A distinction was taken by Lord Langdale between the case where the same person who accepted the trust comes to be relieved from it, in whom it would be caprice to relinquish the trust without any sufficient reason, and the case where on that person's death, the trust devolves on his *representative* by operation of law, and the *representative* applies to the Court (*h*). And where the *executor* of a trustee declined to act as a trustee, and a bill was filed against him to have new trustees appointed, and that the executor might [\*673] pay the costs, the Court said the executor had \*a perfect right to decline acting in the trusts, and allowed him his costs (*a*).

7. **Complication of the trust by the acts of the tenant for life.** — Where the settlement contained a power of appointment of new trustees, and the tenant for life having incumbered his life-estate with annuities and other charges, the original

(*d*) Bennett *v.* Burgis, 5 Hare, 295.

(*e*) Howard *v.* Rhodes, 1 Keen, 581; Porter *v.* Watts, 16 Jur. 757; Hamilton *v.* Fry, 2 Moll. 458.

(*f*) Greenwood *v.* Wakeford, 1 Beav. 581; Forshaw *v.* Higginson, 20 Beav. 486; Courtenay *v.* Courtenay,

3 Jon. & Lat. 529; Gardiner *v.* Downes, 22 Beav. 395; see *ante*, p. 669.

(*g*) Barker *v.* Peile, 2 Dr. & Sm. 340.

(*h*) 1 Beav. 582; and see Aldridge *v.* Westbrooke, 4 Beav. 212.

(*a*) Legg *v.* Mackrell, 1 Giff. 165; 2 De G. F. & J. 551.

trustees were desirous of relieving themselves from the difficulties of their situation by retiring from the trust, and the tenant for life who was the donee of the power could not find any person to undertake the trust, the costs of the suit which the trustees had instituted for their discharge were thrown exclusively upon the fund of the *tenant for life* (b).

8. **Executor cannot be discharged.** — An *executor* is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court, from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee.

(b) *Coventry v. Coventry*, 1 Keen, 758.

## THE CESTUI QUE TRUST.

## CHAPTER XXVI.

IN WHAT THE ESTATE OF THE CESTUI QUE TRUST  
PRIMARILY CONSISTS.

HAVING concluded the subject of the *estate* and *office* of the trustee, it follows next that we investigate the nature and properties of the *Estate* of the *cestui que trust*; and in the present chapter we shall inquire in what the estate of the *cestui que trust* primarily consists. *First*, In the *simple* trust; and *Secondly*, In the *special* trust.

## SECTION I.

## OF THE CESTUI QUE TRUST'S ESTATE IN THE SIMPLE TRUST.

In the *simple* trust the equitable ownership is compounded of the Pernancy of the profits and the Disposition of the estate — the *jus habendi* and *jus disponendi* (a).

*First*. The equitable owner is entitled to the pernancy of the profits.

1. *Cestui que trust* entitled to possession of lands. — In a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate (b); and if the *cestui que trust* be ejected from the possession by the trustee, the *cestui que trust* may compel the trustee to account not only for

(a) *Smith v. Wheeler*, 1 Mod. 17,      *torney-General v. Lord Gore*, Id. 150,  
per Pemberton, J.                      per Lord Hardwicke.

(b) *Brown v. How*, Barn. 354; At-

the rents actually received, but for the whole rents legally demandable from the tenants (c).<sup>1</sup>

\* 2. **Exceptions to the rule.** — The rule which gives [\*675] the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions (a).

Thus a testator devised all his real estate to trustees in fee, upon trust to convey the same for a term of 500 years (the trusts of which were to raise certain *annuities* and *sums*

(c) *Kaye v. Powel*, 1 Ves. jun. 388; *Pugh v. Vaughan*, 12 Beav. 517; 408. *Hoskins v. Campbell*, W. N. 1869, p.

(a) *Jenkins v. Milford*, 1 J. & W. 59; *Etchells v. Williamson*, W. N. 629; *Baylies v. Baylies*, 1 Coll. 537; 1869, p. 61. and see *Denton v. Denton*, 7 Beav.

<sup>1</sup> All benefits and profits of the estate go to the *cestui que trust*. Whether the trustee or *cestui que trust* is entitled to the possession of the trust property depends upon the character of the trust, the duties of the trustee and the rights and privileges of the *cestui que trust*. If the care and management of the trust estate requires the trustee to remain in possession he will do so; *Matthews v. McPherson*, 65 N. C. 189; *Moseley v. Marshall*, 22 N. Y. 200; *Young v. Miles*, 10 B. Mon. 290. The trustee may cultivate the land; *Mayfield v. Kilgour*, 31 Md. 240. If the *cestui que trust* is a female, it is all the more probable that the trustee will be kept in possession; *Wickham v. Berry*, 55 Pa. St. 70. If it is plain that the settlor intended the *cestui que trust* to have possession, as in the occupation of a residence as a home, the settlor's intention must be carried out; *Campbell v. Prestons*, 22 Gratt. 396. If the trust property be personal in its nature, such as stocks, bonds, mortgages and other personal securities, the trustee is ordinarily entitled to possession, even if he has to obtain it from the *cestui que trust*; *Western R. R. Co. v. Nolan*, 48 N. Y. 513; *Pace v. Pierce*, 49 Mo. 393; *Beach v. Beach*, 14 Vt. 28; *Ryan v. Bibb*, 46 Ala. 323. The *cestui que trust* cannot legally question the possession of the trustee; *White v. Albertson*, 3 Dev. 241; *Porter v. Raymond*, 53 N. H. 519. Any suit to obtain possession of chattels to be held in trust, must be brought in the trustee's name; *Thompson v. Ford*, 7 Ired. 418; *Parsons v. Boyd*, 20 Ala. 112; *Schley v. Lyon*, 6 Ga. 530; *Murphy v. Moore*, 4 Ired. Eq. 118. The trustee must protect the rights of the *cestui que trust* in every way; *Roden v. Murphy*, 10 Ala. 804; *Wood v. Burnham*, 6 Paige, 513; *Blin v. Pierce*, 20 Vt. 25; *Welch v. Mandeville*, 1 Wheat. 233. The trustee being liable for all funds and personal property should control them, have a vote on stocks held in trust, a right to foreclose a mortgage, and the like; *In re Barker*, 6 Wend. 509; and so may his executor or administrator; *Bunn v. Vaughan*, 3 Keyes, 345; *North Shore Ferry Co.* 63 Barb. 556.

*in gross*), and subject thereto to the use of A. for life with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into *immediate possession*; but Lord Thurlow said, "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. The Court, perhaps, has let a tenant for life into possession, where it has seen that the best way of performing the trusts would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole, and if I was to do it now, perhaps I should only have to resume the estate" (*b*). The accounts were afterwards taken, and the plaintiff was let into possession on giving *security* to the amount of 10,000*l.* to abide the order of the Court as to the annuities and other incumbrances (*c*).

In another case (*d*), a testator devised and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an annuity of sixty guineas each, and subject thereto upon trust for his daughter for life with remainders over; and the personal estate having sufficed to discharge the funeral expenses, debts and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be [\*676] \*let into possession upon securing the amount of the premiums of the policies: but Sir J. Leach said that if a testator, who gave in the first instance a beneficial interest for life only, thought fit to place the direction of the property in other hands, which was an obvious means of securing the provident management of that property for the

(*b*) *Blake v. Bunbury*, 1 Ves. jun. 194. See the case more fully stated, *Ib.* 514; 4 B. C. C. 21.

(*c*) S. C. 1 Ves. jun. 514, 4 B. C. C. 28.

(*d*) *Tidd v. Lister*, 5 Mad. 429.

advantage of those who were to take in succession, a Court of equity ought not to disappoint that intention by delivering over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who were to take in remainder. There might be cases in which it was plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees: there might be cases in which it was plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There might be very special cases in which the Court would deliver the possession of the property to the *cestui que trust* for life, *although the testator's intention appeared to be that it should remain with the trustees*; as, where the personal occupation of the trust property was beneficial to the *cestui que trust*; in which case the Court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. And his Honour, considering that there was no such ground of exception in the case before him, refused the application.<sup>1</sup>

3. *Cestui que trust for her separate use.* — In one case a *feme covert* was entitled to her *separate use* for her life, and it was not thought incompatible with the nature of such an estate that she should be put into possession, though the claim was opposed by the trustees (*a*). A tenant for life cannot claim possession as a *right*, but only at the discretion and by the sufferance of the Court; and therefore, where trustees were directed as managers of the estate to pay insurances and repairs and other necessary outlays, and apply the net annual income to the separate use of a person for life, it was held that such tenant for life was not a person "entitled to possession or receipt of the rents and profits" for life within the meaning of the Leases and Sales of Settled Estates

(*a*) *Horner v. Wheelwright*, 2 Jur. bell, W. N. 1869, p. 59; Taylor v. N. S. 367; and see *Hoskins v. Camp-* Taylor, 20 L. R. Eq. 297.

<sup>1</sup> And see *Wade v. Wilson*, 33 W. R. 610.

Act, and could not therefore grant leases under the [\*677] \* Act. Such a power would in fact *pro tanto* neutralise the powers of management vested in the trustees (a).

4. *Cestui que trust cannot recover the possession at law.*— Until a recent Act, to be noticed presently, the *cestui que trust's* right to the possession was recognised, we must remember, in a Court of *equity* only; for in a Court of *law* the *cestui que trust* was merely tenant at will (b), and this tenancy was determinable at any time on *demand of possession* by the trustee, though not before such demand (c). The doctrines advanced by Lord Mansfield in the last century were long ago over-ruled. It was maintained in his day, that a *cestui que trust*, a plaintiff in ejectment, could not be nonsuited by a term outstanding in his trustee (d); and that a trustee, a plaintiff in ejectment, could not recover against his own *cestui que trust* (e). It was even decided that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge), notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied (f). Such at least were the doctrines in cases of

(a) *Taylor v. Taylor*, 20 L. R. Eq. 297. [But see observations of L. J. James in *Taylor v. Taylor*, 3 Ch. D. 147; and see *Vine v. Raleigh*, 24 Ch. D. 238; where it was held that if an estate is vested in trustees, and there is not for the time being any person beneficially entitled to the rents and profits, the trustees are the persons who may under the 23d section of the Settled Estates Act, 1877, (40 & 41 Vict. c. 18) apply to the Court to exercise the powers conferred by the Act; and a distinction was drawn between the language of that section and that of the 46th section, under which the person entitled to the possession or to the receipt of the rents and profits of the settled estates for an estate for life, &c., either in his own right or in right of his wife (words

pointing to a *beneficial* ownership) is authorised to grant leases for twenty-one years. And see *Wade v. Wilson*, 33 W. R. 610.]

(b) *Garrard v. Tuck*, 8 C. B. 231; *Melling v. Leak*, 1 Jur. N. S. 759; *Parker v. Carter*, 4 Hare, 400; *Perry v. Shipway*, 1 Giff. 1; and see *Geary v. Bearcroft*, O. Bridgn. 486-490; *Bac. Us. 5*; *Doe v. Jones*, 10 B. & Cr. 718; *Doe v. M'Kaeg*, 10 B. & Cr. 721; *post*, Chap. xxx. s. 1.

(c) *Doe v. Phillips*, 10 Q. B. 130.

(d) *Lade v. Holford*, B. N. P. 110. The doctrine is said to have originated with Mr. Justice Grundy.

(e) *Armstrong v. Peirse*, 3 Burr. 1901.

(f) *Bristow v. Pegge*, 1 T. R. 758, note (a); overruled by *Doe v. Staple*, 2 T. R. 684.

clear trusts: for where the equity was at all *doubtful*, the rights of the parties were even then referred to the proper tribunal (*g*). "Lord Mansfield," as Lord Redesdale observed, "had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same Courts" (*h*). From the time of Lord Mansfield, and until the recent Act, it was established: — *First*, that a *cestui que trust* could \*not recover in ejectment (*a*), unless a surrender to him of the legal estate could be reasonably presumed (*b*), (which, of course, could not be where the circumstance of the outstanding legal estate appeared on the declaration or special case (*c*),) and the *cestui que trust* had no alternative but to bring his action in the name of the trustee, who was to be indemnified against the costs (*d*): *Secondly*, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust* (*e*); and the *cestui que trust* had no defence to the action at law, but must have had recourse to an injunction in equity (*f*), and the clause in the Common Law Procedure Act, 1854, which authorised an equitable defence at law did not apply to ejectment (*g*). However, a lessee under a *feme covert* entitled to her separate use might protect himself by equitable plea against trespass by the husband, in whom the legal estate was vested (*h*).

5. 36 & 37 Vict. c. 66. — Now, generally, by 36 & 37 Vict. c. 66, s. 24, equitable defences are to be recognised in all the Courts, so that for the time to come the full merits,

(*g*) *Doe v. Pott*, Doug. 696, per Lord Mansfield; *Goodright v. Wells*, Id. 747, per eundem.

(*h*) *Shannon v. Bradstreet*, 1 Sch. & Lef. 68.

(*a*) *Doe v. Staple*, 2 T. R. 684; see *Barnes v. Crow*, 4 B. C. C. 10 & 11; *Doe v. Sybourn*, 7 T. R. 3; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Doe v. Wroot*, 5 East, 138.

(*b*) *Doe v. Sybourn*, 7 T. R. 2; see *Doe v. Staple*, 2 T. R. 696; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Roe v. Reade*, 8 T. R. 122.

(*c*) *Goodtitle v. Jones*, 7 T. R. 43;

see *Doe v. Staple*, 2 T. R. 696; *Roe v. Reade*, 8 T. R. 122.

(*d*) *Annesley v. Simeon*, 4 Mad. 390; and see *Reade v. Sparkes*, 1 Moll. 11; *Jenkins v. Milford*, 1 J. & W. 636; *Ex parte Little*, 3 Moll. 67.

(*e*) See *Roe v. Reade*, 8 T. R. 122, 123.

(*f*) *Shine v. Gough*, 1 B. & B. 445.

(*g*) *Neave v. Avery*, 16 C. B. 328, and see *Smith v. Hayes*, 1 I. R. C. L. 333; *Clarke v. Reilly*, 2 I. R. C. L. 422.

(*h*) *Allen v. Walker*, 5 L. R. Ex. 187.



both at law and in equity, will be administered in the same action.

6. **Leases by a cestui que trust.** — As a tenant is not allowed to dispute his landlord's title, if a *cestui que trust*, having only an equitable estate, grant a lease, then, as between lessor and lessee, the lessor may distrain and exercise the other rights of a landlord in the same way as if at the date of the demise he had been the legal owner (*i*). The title of the lessor might be such, that on his death the person claiming under him could not prove the devolution of the estate without showing upon the pleadings that at the date of the lease the lessor's interest was equitable, and in such a case it is presumed the estoppel would not apply, and the remedy would be in equity (*j*). But if there be no difficulty upon the pleadings, the persons claiming under the [ \*679 ] \*lessor, as, for instance, his trustee in bankruptcy, had always the same benefit of the rule as the lessor had (*a*).

7. **Notice to quit.** — If the trustees put the *cestui que trust* in possession, and the *cestui que trust* grants a lease and afterwards serves a notice on the lessee to quit, the *cestui que trust* is the agent of the trustees for the purposes of the notice, and an ejectment by the trustees can be sustained as if the notice had been given by themselves (*b*).

8. **Injunction between tenants in common.** — If there be *two cestuis que trust* tenants in common, and one of them be put into possession, and cuts timber, and becomes insolvent, the other *cestui que trust* can obtain an injunction (*c*).

9. **Possession of the title deeds.** — The *title deeds* of an estate form no part of the usufructuary enjoyment; and therefore if a person vests an estate in trustees upon particular trusts, one of which is to receive the rents and pay them over to the settlor for life, and the deeds are *delivered into their possession*, they have a right to the custody of them for

(*i*) *Alchorne v. Gomme*, 2 Bing. 54; *Blake v. Foster*, 8 T. R. 487; *Parker v. Manning*, 7 T. R. 537.

(*a*) *Parker v. Manning*, 7 T. R. 537.

(*b*) *Jones v. Phipps*, 3 L. R. Q. B. 567.

(*j*) See *Noke v. Awder*, Co. Eliz. 373, 436. See 2 Lord Raymond, 1553.

(*c*) *Smallman v. Onions*, 3 B. C. C. 621.

the benefit of all parties interested (*d*), and should the *settlor* obtain them from the trustees, and thereby be enabled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently, or under such gross negligence as amounted to constructive fraud, would be held personally responsible for the consequences (*e*). However, a tenant for life, if the estate be *legal*, is entitled to the custody of the deeds (*f*), and may bring an action of detinue (*g*), or, unless he has shown that he cannot be safely trusted with the deeds (*h*), may take proceedings in equity for the recovery of them (*i*); and as equity follows law, the Court, in the absence of special trusts requiring the possession of the deeds by the trustees, will not take the deeds from the tenant for life who has got possession of them (*j*); and where the tenant for life in equity is *not the settlor*, and therefore cannot by suppressing the settlement make a title to the fee simple, has ordered the deeds to be delivered to the tenant for life \*in equity (*a*), subject [\*680] of course to the remainderman's right to production and inspection to a reasonable extent (*b*). Where the legal estate, whether of freeholds, copyholds, or leaseholds, is

(*d*) See *Garner v. Hannington*, 22 Beav. 630; *Stanford v. Roberts*, 6 L. R. Ch. App. 307.

(*e*) See *Evans v. Bicknell*, 6 Ves. 174.

(*f*) In *Foster v. Crabb*, 12 C. B. 136, the court seems to have approved the rule laid down in early times, that whoever first gets possession of the deeds, whether tenant for life or in remainder, keeps them. But see *Garner v. Hannington*, 22 Beav. 627; *Webb v. Webb*, 1 Eden, 8; *Duncombe v. Mayer*, 8 Ves. 320; [*Leathes v. Leathes*, 5 Ch. D. 221;] and *Sugd. Vend.* and P. 14th edit. p. 445, note (1).

(*g*) *Allwood v. Heywood*, 1 N. R. 289.

(*h*) See *Jenner v. Morris*, 1 L. R. Ch. App. 603.

(*i*) *Garner v. Hannington*, 22 Beav. 627.

(*j*) *Taylor v. Sparrow*, 4 Giff. 703,

9 Jur. N. S. 1226; and see *Denton v. Denton*, 7 Beav. 388.

(*a*) *Langdale v. Briggs*, 8 De G. M. & G. 391. In one case where deeds had been deposited in Court, and the tenant for life (whether legal or equitable is not clear) asked that the deeds might be delivered out to him, the Court refused, observing that "The Court never interfered as to the possession of deeds between a father, tenant for life, and a son entitled in remainder, but that in the case of a stranger tenant for life, the Court would interfere;" *Warren v. Rudall*, 1 J. & H. 1. But this, as observed by V. C. Stuart, was a mere *obiter dictum*; *Taylor v. Sparrow*, 9 Jur. N. S. 1227; [and has since been expressly disapproved of, *Leathes v. Leathes*, 5 Ch. D. 221.]

(*b*) *Davis v. Dysart*, 20 Beav. 405; *Pennell v. Dysart*, 25 Beav. 542.

vested in a trustee or executor in trust, not for certain persons entitled in succession, but for *cestuis que trust* entitled absolutely in possession, the *cestuis que trust*, or if they are infants, their guardians, may institute proceedings to have the deeds delivered up to them. But as to *leaseholds*, an *executor* may hold the deeds until all debts have been paid and the personal estate cleared (*c*).

[The trustee in bankruptcy of the husband of a legal tenant for life (not entitled to the property as separate estate), has not an absolute right to the custody of the title deeds during the coverture; but where the circumstances require it, they will be ordered to be brought into Court for safe custody (*d*).]

10. *Cestuis que trust* entitled to inspect documents. — *Cestuis que trust* have a right at all seasonable times to *inspect* the documents relating to the trust, and at their own expense to be furnished with *copies* of them, and the rule extends to *cases* submitted and *opinions of counsel* taken by the trustees for their guidance in the discharge of their duty, for as the expense falls upon the trust estate, it stands to reason that the *cestuis que trust* may see the opinions and cases for which they pay. But the right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court (*e*).

11. *Custody of deeds may be committed to one of the trustees*. — As the deeds and documents relating to the

(*c*) *Smith v. Pavier*, V. C. Wood, 18 July, 1852. In this case J. Smith devised freeholds and leaseholds for long terms to Wade and Pavier and their heirs to the use of Joel Smith for life with remainder to Wade and Pavier to preserve contingent remainders, with remainder to the children of Joel Smith (who were infants at the filing of the bill) and the heirs of their bodies, with remainders over, including limitations to Wade and Pavier to preserve contingent remainders, who were also executors. Wade and Pavier took possession of the title deeds on the testator's death, and held

them during the life of Joel Smith. On his death the infant children by their next friend, with two other persons as co-plaintiffs (being their guardians appointed by the court) filed their bill against Pavier the surviving executor for delivery of the deeds, and there being no allegation of unpaid debts, the delivery of the deeds to the two guardians was ordered.

[(*d*) *Ex parte Rogers*, 26 Ch. D. 31.]

(*e*) *Wynne v. Humberston*, 27 Beav. 421.

trust cannot be \* held by *all* the trustees (unless they [\*681] be deposited with bankers with a direction not to part with them except on the authority of the whole number), co-trustees have been held to be justified in committing the custody of the deeds to one of themselves; and where the deeds are a security for money, the possession by the one is no implied authority from the co-trustee to him who holds them to receive the principal money secured (*a*).

12. *Privileges of cestui que trust.* — Upon the principle that the *cestui que trust* is *foro conscientie* entitled to the pernaney of the profits, he has been invested by the express language of some statutes, and by the equitable construction of others, with the various privileges conferred by the legislature upon the legal tenants of real estate.

13. *Qualification of cestui que trust to be a juror.* — By 6th Geo. 4, c. 50, s. 1, Every man between the ages of 21 and 60, residing in any county in England, who shall have in his own name or *in trust for him* within the same county 10*l.* by the year, above reprises, in real estate, &c., &c., is qualified to serve as a *juror* (*b*).

14. *As to right of cestui que trust to vote for a coroner.* — The election of *coroner* is a right vested in the *freeholders* of the county; and the privilege of voting must, it is conceived, have belonged originally to the *legal* freeholder. However, by 58th Geo. 3, c. 95, s. 2, it was enacted that no person should be allowed to have any vote for or by reason of any trust estate or mortgage unless such trustee or mortgagee should be in actual possession or receipt of the rents and profits, but that the *cestui que trust* or mortgagor in possession should vote for the same estate. Upon the repeal of 58 Geo. 3, c. 95, by the late Coroner's Act (*c*), the provision referred to was not re-enacted, and the consequence is that an *equitable owner* has now no right to vote (*d*).

15. *Right of cestui que trust to sport under the old law.* — By the Game Act, 22 & 23 Car. 2, c. 25, s. 3, persons were

(*a*) *Cottam v. Eastern Counties Railway Company*, 1 J. & H. 243; *Goldney v. Bower*, cited *Ib.* 247.

(*b*) And see *Co. Litt.* 272 a, 272 b.

(*c*) 7 & 8 Vict. c. 92.

(*d*) *Regina v. Day*, 3 Ell. & Bl. 859.

disqualified from sporting unless they had *lands and tenements*, &c., of the clear value of 100*l. per annum*; and it was decided that a *cestui que trust* of lands to that amount was within the intention of the Act. Lord Mansfield observing, that "the privilege was given to *property*, and the *cestui que trust* was *substantially* the owner and the trustee only *nomi-nally*" (e). By the provisions of the late Game Act no qualification is now necessary (f).

16. **Right of cestui que trust to vote at elections for members of Parliament.** — By 6th Vict. c. 18, s. 74, "no trustee of lands or tenements shall in any case have a right to [\*682] vote in any such election, \* (*i.e.* for a Member of Parliament) for or by reason of any trust estate therein, but the *cestui que trust* in actual possession, or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, shall and may vote for the same notwithstanding such trust" (a).

[17. **Protector of the settlement.** — The person entitled to the beneficial enjoyment of the rents and profits of the settled property, under a settlement made *since* the Fines and Recoveries Act, is the protector of the settlement under section 22 of the Act, as *owner* of the prior estate, and not the trustees in whom the legal estate is vested; and in a settlement made *before* the Act, if the estates are equitable the beneficial owner is also protector (b).]

18. **Income and corpus distinguished.** — The question frequently arises both in construing Acts of Parliament which speak of a limited amount of *income* and also in determining the relative rights of *tenants for life and remaindermen*, what is *income* and what is *corpus*, and it has been held that the tenant for life of a manor is entitled to the fines payable on all customary grants (c), or on admissions (d), and where leaseholds are annually renewable, the tenant for life of the

(e) *Wetherell v. Hall*, Cald. 230.

(f) 1 & 2 W. 4, c. 32.

(a) See *Wallis v. Birks*, 5 L. R. C. P. 222; and see *ante*, p. 235.

[(b) *Re Dudson's Contract*, 8 Ch.

D. 628; *Re Ainslie*, 51 L. T. N. S. 780; and see *ante*, p. 382.]

(c) *Earl Cowley v. Wellesley*, 35 Beav. 640.

(d) S. C. 35 Beav. 641.

reversion is entitled to the annual fines for renewal (*e*); [and where leaseholds for lives are perpetually renewable on the dropping of the lives, the tenant for life of the reversion is entitled to the heriots and fines for renewal, as they are of the nature of casual profits accruing during his tenancy for life (*f*).] So a tenant for life is entitled to underwood and thinnings of plantations in ordinary course (*g*), and to rents and royalties payable under the lease of an open mine (*h*), or of a brickfield, whether the lease was granted by the testator or by the trustee of his will under a power in the will (*i*), and to the produce of gravel, loam, peat, or bog-earth got annually according to the usual custom (*j*). But a tenant for life is not entitled to trees in woodlands not cut periodically according to custom, though cut for the sake of improving the growth of the rest (*k*).

[19. **Mines and timber.** — Under the Settled Land Act, 1882, a tenant for life whether \*impeachable [\*683] for waste or not, can now grant mining leases of mines either opened or unopened and is entitled if impeachable for waste to one-fourth part of the rents, and if not impeachable for waste to three-fourth parts of the rents (*a*). And as a tenant for life although impeachable for waste, has a right to continue the working of open mines, he will be entitled, if a lease is granted of such mines under the powers of the Act, to three-fourths of the rents. Under the same Act a tenant for life impeachable for waste, may on obtaining the consent of the trustees of the settlement or an order of the Court cut and sell timber, ripe and fit for cutting, and is entitled to one-fourth part of the net proceeds but the remaining three-fourths are to go as capital (*b*).

20. **Loss on business held in trust for persons successively.** — If a business be held in trust for successive tenants for life, and remaindermen, and be carried on at a loss during the life of the first tenant for life, the loss must be made

(*e*) *Milles v. Milles*, 6 Ves. 761.

[(*f*) *Brigstocke v. Brigstocke*, 8 Ch. D. 357.]

(*g*) *Earl Cowley v. Wellesley*, 35 Beav. 635.

(*h*) S. C. 35 Beav. 639.

(*i*) S. C. 35 Beav. 638.

(*j*) S. C. 35 Beav. 639.

(*k*) S. C. 35 Beav. 635.

[(*a*) Sects. 6, 11.]

[(*b*) Sect. 35.]

good out of the profits earned during the life of the next tenant for life and not out of the corpus (*c*), unless a contrary intention appears in the instrument creating the trust.<sup>1</sup>]

21. **Succession duty.**—The tenant for life of an estate must bear the expense of *accounts* necessary to be taken for the discharge of the *succession duty*, payable by the tenant for life as successor (*d*), and must discharge the *rates* and *taxes* payable during his life (*e*).

22. **Fencing.**—The expense of *fencing* newly acquired enclosures will fall upon the corpus (*f*).

23. **Cestui que trust's possession of chattels.**—Hitherto we have spoken of the *cestui que trust's* right to the pernanacy of the profits in respect of *lands*. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy of the tenant for life, though left in the possession of the bankrupt by permission of the legal owner, for they are left with him according to the title (*g*).

24. **Household goods.**—In a bequest to a person of the use of *household goods*, it seems the legatee may use them in his own or in any other person's house, and either [\*684] alone or promiscuously with other goods, or, it is \*said, may let them out to hire (*a*); but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire except together with the house itself (*b*).

[(*c*) *Upton v. Brown*, 26 Ch. D. 588; but see *Gow v. Forster*, 26 Ch. D. 672, the decision in which seems to have turned on the wording of the will and not on any general principle.]

(*d*) *Earl Cowley v. Wellesley*, 35 Beav. 642.

(*e*) *Fontaine v. Pellet*, 1 Ves. jun. 337, see 342.

(*f*) *Earl Cowley v. Wellesley*, 35 Beav. 641.

(*g*) See *supra*, p. 243.

(*a*) *Marshall v. Blew*, 2 Atk. 217.

(*b*) *Cadogan v. Kennet*, Cowp. 432;

<sup>1</sup> *Re Millichamp*, 52 L. T. N. S. 758.

Of course the use of the chattels by the tenant for life does not enable him to *pawn* them beyond the extent of his own interest (*c*).

[25. **Heirlooms.** — By the Settled Land Act, 1882, s. 37, a tenant for life may sell personal chattels settled as heirlooms, and the money arising by the sale is to be capital money under the Act, and to be dealt with accordingly, or it may be invested in the purchase of other chattels to be settled and held on the same trusts. But no sale or purchase of chattels under the section is to be made without an order of the Court (*d*).]

26. **Stock in the funds.** — Where the trust fund consists of *stock*, the *cestui que trust* is usually put in possession of the dividends by a *power of attorney* from the trustee to the *cestui que trust's* bankers, with a written authority from the trustee to the bankers to credit the *cestui que trust* with the dividends as and when received, by which arrangement the trustee is spared the trouble of repeated personal attendances at the Bank of England, and the entries in the books of the private bankers are sufficient evidence of the receipt. In cases where the *cestui que trust* is *tenant for life*, this course seems free from objection; but where his interest is one which may *determine in his lifetime*, some risk is incurred of the power of attorney and authority being acted upon by the bankers after the determination of the *cestui que trust's* estate; and it is conceived that the trustee would be liable to the other *cestui que trust* for any misappropriation thus taking place. The trustee must be careful to see that the power of attorney extends only to the receipt of the *dividends*, and not to the *sale of the stock* itself; otherwise, if the bankers sell out the stock and the proceeds are misapplied, the trustee will be answerable (*e*).

*Secondly. Of the jus disponendi.*

1. **Cestui que trust's right of disposition of the legal estate.** — The *cestui que trust* may call upon the trustee to execute

[and see *Re Brown's Will*, 27 Ch. D. 179.]

[(*d*) As to this section see *ante*, p. 566.]

(*c*) *Hoare v. Parker*, 2 T. R. 376.

(*e*) See *Sadler v. Lea*, 6 Beav. 324.



conveyances of the legal estate as the *cestui que trust* directs (*f*). If the trustee refuse to comply, and the *cestui que trust* institutes proceedings to compel him, the [\*685] trustee will be visited with the \* costs (*a*), unless there was some reasonable ground for his refusal (*b*), or he acted *bonâ fide* under the advice of counsel (*c*); and the trustee has been made to pay costs, though the *cestui que trust*, instead of filing a *bill*, might have enforced a conveyance by the summary process of a *petition* (*d*). But a trustee has a right to be satisfied by the fullest evidence that the party requiring the conveyance is the exclusive *cestui que trust* (*e*); and a *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable: an equitable tenant in *tail*, for instance, cannot call for a conveyance of the legal *fee-simple* (*f*). And Lord Eldon was of opinion that a *cestui que trust* could not require the trustee to divest himself from time to time of *different parcels* of the trust estate; for the trustee has a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper" (*g*). And a trustee, like a mortgagee, cannot be called upon to convey the estate by any other words or description than that by

(*f*) *Payne v. Barker*, Sir G. Bridgm. Rep. 24.

(*a*) *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 137; *Thorby v. Yeats*, 1 Y. & C. C. C. 438; *Penfold v. Bouch*, 4 Hare, 271; *Firmin v. Pulham*, 2 De G. & Sm. 99; *Palairer v. Carew*, 32 Beav. 565; and see *Campbell v. Home*, 1 Y. & C. C. C. 664.

(*b*) *Goodson v. Ellisson*, 3 Russ. 583; *Poole v. Pass*, 1 Beav. 600.

(*c*) *Angier v. Stannard*, 3 M. & K. 556; and see *Devey v. Thornton*, 9 Hare, 232; *Field v. Donoughmore*, 1 Dru. & War. 234; [*Stott v. Milne*, 25 Ch. D. 710.]

(*d*) *Watts v. Turner*, 1 R. & M. 634.

(*e*) *Holford v. Phipps*, 3 Beav. 434, and see *Etchells v. Williamson*, W. N. 1869, p. 61.

(*f*) *Saunders v. Neville*, 2 Vern. 428. But though this point may have been mooted in the case and ruled as reported, yet the principal question in the cause was a different one, viz., whether under the circumstances the plaintiff was entitled to call for a conveyance of the legal estate even to him, and "the heirs of his body." See note by Raithby, correcting the text from the Reg. Book.

(*g*) *Goodson v. Ellisson*, 3 Russ. 594. But if the *cestuis que trust* of a fund, as tenant for life and remainderman, assign part of the fund, it is conceived that the trustee cannot refuse to transfer that part to the assignee. The owner of an aliquot share has a separate claim in respect of it: *Smith v. Snow*, 3 Mad. 10.

which the conveyance was made to himself (*h*). And a trustee cannot be compelled to execute a conveyance containing inaccurate recitals; but where all the *cestuis que trust* are parties, he cannot insist on the insertion of recitals against the wishes of his *cestuis que trust* (*i*).

**Succession duty.** — And a trustee in whom any property is vested which is liable to *succession duty*, must see that the duty is satisfied or he becomes personally liable (*j*).

[2. **Under the Settled Land Act.** — Where property is disposed of by the beneficial owner under the provisions of the Settled Land Act, 1882, as by the 20th section he is empowered to convey the property for the estate, or interest the subject of the settlement, and can therefore pass the legal \*estate, if comprised in the settlement, [\*686] without the concurrence of the trustees, it is conceived that the trustees would not be compelled to join in the assurance.]

3. **Trustee for separate use.** — A trustee for the *separate use* of a married woman with *restraint of anticipation*, holds upon a special trust during the coverture;<sup>1</sup> but if the husband die, the trust for the separate use is suspended and the *feme* has an absolute power of disposition, though on a future coverture the separate use and non-anticipation clause, if not prevented by previous disposition, would revive. The trustee, therefore, after the death of the husband, holds upon a simple trust for the *feme*, and is bound at her direction to convey the legal estate to her (*a*).

4. **Fraudulent appointments.** — It not unfrequently happens that when property is held upon trust for a tenant for life, with a power of appointment among his children, and in

(*h*) Goodson v. Ellisson, *ubi supra*.

(*j*) 16 & 17 Vict. c. 51, s. 44.

(*i*) Hartley v. Burton, 3 L. R. Ch. App. 365.

(*a*) Buttanshaw v. Martin, Johns. 89.

<sup>1</sup> A married woman may be restrained from alienating or anticipating the trust income; Snyder's App. 92 Pa. St. 504; Ash v. Bowman, 10 Phila. 96. Power of appointment and payment can have no validity or value until the returns are actually due; Kent v. Plumb, 57 Ga. 207; Loring v. Salisbury Mills, 125 Mass. 138. Restraints against alienation or anticipation apply to estates for life or in fee, to real or personal property; Freeman v. Flood, 16 Ga. 528; but not to unmarried women or widows; Parker v. Converse, 5 Gray, 336.

default of appointment for the children, the trustee is called upon to make a conveyance by the joint direction of the parent and such of the children as are the appointees, and the trustee has a shrewd suspicion that *undue influence* has been used, or that there is an *underhand bargain* in derogation of the rights of the other children, who take nothing by the appointment. In these cases, if the nature of the transaction be such as to show on the face of it that there is good ground for suspicion, the trustee will, on refusing to convey, be protected by the Court, and be entitled to his costs (*b*). But, although it may be the duty of the trustee to make inquiry as to the *bona fides* of the transaction, yet, if he cannot prove any *mala fides*, the mere *possibility* of fraud or undue influence will not be sufficient, and if a trustee decline to convey without any better reason, he will have to bear the costs of a suit for compelling him, though he will still be entitled to his charges and expenses properly incurred not being costs in the cause (*c*).

5. **Inquiry into a collateral trust.**—Trustees who are bound to make a conveyance of their trust estate, cannot justify their refusal to convey by alleging a duty to *inquire into another trust* recited in their trust deed, but which is wholly distinct from the trust in question (*d*).

6. **Delivery of possession to remainderman.**—Where the legal estate is vested in trustees for A. for life, with remainder to B., and on the death of A. application for a conveyance is made by B., the trustees sometimes object that they cannot convey until they have recovered all the *arrears of rent* that accrued in the lifetime of A. (*e*). In such a case the [\*687] trustees are, \*at all events, bound to use due diligence, and must not from their *laches* postpone the rights of the remainderman. But the better course would be to give

(*b*) *Hannah v. Hodgson*, 30 Beav. 19; *King v. King*, 1 De G. & J. 663.

(*c*) *Firmin v. Pulham*, 2 De G. & Sm. 99; *Campbell v. Home*, 1 Y. & C. C. C. 664.

(*d*) *Palairot v. Carew*, 32 Beav. 564.

(*e*) See Bacon's Abridg. "Dis-

truss." This claim was made by the trustees in *Hogg v. Jones*, reported upon another point, 32 Beav. 45, and M. R. ordered delivery of possession to the remainderman, on his undertaking in effect to use due diligence in receiving the arrears and handing them over.

the trustees an *indemnity* on delivery of possession, or an *undertaking* to receive the arrears and account for them to the tenant for life's estate.

7. **Trustee's conveyance.** — The 4th section of 8 & 9 Vict. c. 106, enacts that the word "*grant*" shall not imply any covenant in law except so far as the same may, by force of any Act of Parliament, imply a covenant; and therefore, whatever may have been the case formerly, a conveying trustee cannot now draw any liability upon himself by the use of the word *grant alone*. But, as to lands in *Yorkshire*, it must be remembered that the Yorkshire Registry Acts (*a*) gave the force of covenants for title to the combined words "*grant, bargain, and sell*." And by the Lands Clauses Consolidation Act, the word "*grant*" in conveyances by *companies* within the provision of the Act is made to carry with it the ordinary covenants for title (*b*).

[By the Conveyancing and Law of Property Act, 1881, the use of the word "*grant*" is rendered unnecessary for the conveyance of hereditaments, corporeal or incorporeal, whether in instruments before or after the commencement of the Act (*c*).]

8. **Trustee to bar dower.** — Before the abolition of tortious conveyances, a trustee to bar dower was or was not called upon to join in a conveyance, according to the circumstances of the case. Where a power of appointment was exercised besides the ordinary conveyance, his joining was dispensed with; but where, no power being exercised, the whole fee could not be passed without his concurrence, he was made a party (*d*). In a recent case, it was held by V. C. Stuart that a purchaser was still entitled to call for the concurrence of the trustee to bar dower, where the deed creating the uses to bar dower was dated before 8 & 9 Vict. c. 106, s. 4, so that a forfeiture might by possibility have occurred. The Vice Chancellor, however, considered that the objection taken by the purchaser to the title, which was founded on the non-

(a) 6 Anne, c. 35, ss. 30, 34; 8 G. 2, c. 6, s. 35. [Repealed as from the 1st January, 1885, by 47 & 48 Vict. c. 54.]

(b) 8 & 9 Vict. c. 18, s. 132.

[(c) 44 & 45 Vict. c. 41, s. 49.]

(d) See Sug. Pow. 8th Ed. p. 193,

*et seq.*

concurrence of the dower trustee, who was absent in Australia, was frivolous and vexatious, and had an extremely slight foundation, and on that account refused to give the purchaser any costs (*e*). On appeal, the Lord Chancellor \* and L. J. Knight Bruce seem to have considered the objection altogether untenable, though they did not distinctly decide the point (*a*). The practical result is, that for the future a purchaser cannot be advised to require the concurrence of the trustee to bar dower.

9. **A series of equitable interests.**—In general there are *no intermediate steps of the equitable interest*, so that if A. be trustee for B. who is trustee for C., A. holds in trust for C., and must convey the estate as C. directs (*b*). But if any special confidence or discretionary power be reposed in B., which requires him to have the legal estate, he may then call upon the original trustee to execute a transfer to himself (*c*). And if a fund be vested in trustees in trust for a *feme covert* for life for her separate use, with remainder upon such trusts as she may by will appoint, and she by will gives legacies, and disposes of the residue and appoints executors, the original trustees are bound to transfer the fund to the executors to be administered by them (*d*); [and where the original trustees, instead of transferring the fund to the executors, paid it into Court under the Trustee Relief Act, they were made to pay the costs of the petition for getting the fund out of Court (*e*). But if the donee of a *special* power of appointment appoint the fund to trustees in trust for the objects of the power, the trustees so nominated cannot call for a transfer of the fund (*f*).]

(*e*) *Collard v. Roe*, 4 Jur. N. S. 431.

(*a*) *Ib.* 4 De G. & J. 525.

(*b*) *Head v. Lord Teynham*, 1 Cox, 57; and see — *v. Walford*, 4 Russ. 372.

(*c*) *Wetherell v. Wilson*, 1 Keen, 86; *Cooper v. Thornton*, 3 B. C. C. C. 96, 186; *Woods v. Woods*, 1 M. & Cr. 409; *Angier v. Stannard*, 3 M. & K. 571; *Onslow v. Wallis*, 16 Sim. 483, 1 Mac. & G. 506; — *v. Walford*, 4 Russ. 372; *Poole v. Pass*, 1 Beav. 600.

(*d*) *Re Philbrick's Trust*, 13 W. R. 570; and see *Hayes v. Oatley*, 14 L. R. Eq. 1.

(*e*) *Re Hoskin's Trusts*, 5 Ch. D. 229, 6 Ch. D. 281; but see as to this case *Turner v. Hancock*, 20 Ch. D. 303.]

(*f*) *Busk v. Aldam*, 19 L. R. Eq. 16. But see *Scotney v. Lomer*, 29 Ch. D. 535, where North, J., was of the opposite opinion.]

10. **Trustees for appointees.**—Where trustees hold a fund *upon such trusts* as a person by an instrument to be executed in a particular manner may *appoint*, they must of course be careful in transferring it to the appointees to see that all the formalities attending the power have been duly observed, for if the execution of it be not regular, the trustees (except in those cases where Courts of equity aid a defective execution) will be personally liable for the fund to the parties claiming in default of the execution of the power (*g*).

11. **Costs.**—The *costs* incurred by the trustee in relation to the conveyance must be paid by the *cestui que trust*, or, which is the same thing, must be discharged out of the trust estate.

## \*SECTION II.

[\*689]

## OF THE CESTUI QUE TRUST'S ESTATE IN THE SPECIAL TRUST.

1. **Cestui que trust's estate in special trust.**—This may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them (*a*).

2. **Special trust may be converted into a simple trust.**—If there be only one *cestui que trust*, or there be several *cestuis que trust*, and all of *one mind* (in each case *sui juris*), the specific execution may be stayed, and the *special* trust will then acquire the character of a *simple* trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are in equity, from the creation of the

(*g*) *Hopkins v. Myall*, 2 R. & M. 86; *Cocker v. Quayle*, 1 R. & M. 535; *Reid v. Thompson*, 2 Ir. Ch. Rep. 26. (a) See *Deeth v. Hale*, 2 Moll. 317.

trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors. Thus if a fund be given to trustees upon trust to accumulate until A. attains *twenty-four*, and then to transfer the gross amount to him, A., on attaining *twenty-one*, may, as the person exclusively interested, call for the immediate payment (*b*). So if real estate be devised with a direction that the devisees are not to have the enjoyment until they attain the age of *twenty-five years*, unless there be a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property until the age mentioned, but that some other person is to have the enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will the direction as to non-enjoyment, and gives the property at once to the devisees as the absolute owners (*c*). So if a legacy \*be bequeathed to trustees upon trust to purchase an *annuity*, the intended annuitant, if *sui juris*, may claim the legacy without going through the form of investment (*a*); and if a fund be vested in trustees in trust for the *personal* support, clothing, and maintenance of A., an adult, A. is exclusively entitled to the benefit of the fund, and if he become bankrupt, it passes to his trustee in bankruptcy (*b*).

3. To illustrate this subject further, where a conveyance had been made to trustees upon trust to sell, and with the proceeds to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee, and the daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements, the question was, whether the entail had been effectually barred; and Sir W. Grant

(*b*) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240; and see *Curtis v. Lukin*, 5 Beav. 147; *Rocke v. Rocke*, 9 Beav. 66; *Magrath v. Morehead*, 12 L. R. Eq. 491.

(*c*) *Gosling v. Gosling*, Johns. 265. (*a*) *Dawson v. Hearn*, 1 R. & M. 606, and cases there cited; *Re Browne's Will*, 27 Beav. 324.

(*b*) *Youngehusband v. Gisborne*, 1 Coll. 400.

said, "In the lands to be sold they (the daughters) had no interest, legal or equitable, *expressly* limited to them: but the equitable interest in those lands must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a Court of equity inquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land, to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out: so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct: *if there are also other purposes for which it is sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provide for them he may keep the estate unsold.* The daughters by electing to keep this estate have acquired the fee, and it was discharged of every trust to which it had been subject" (c).

4. **Special trust proceeds till countermanded by the cestui que trust.** — But until the *cestui que trust* or the joint *cestuis que trust* countermand the specific execution, the special trust will proceed; as if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A. until \* he dis- [\*691] charge the character impressed upon it by electing to take it as land (a).

5. **Accounts.** — As an incident to the beneficial enjoyment by the *cestui que trust* of his interest, he has a right to call upon the trustee for accurate *information* as to the state of the trust (b). Thus, in a trust for sale and payment of

(c) *Pearson v. Lane*, 17 Ves. 101.

(a) See *Walter v. Maunde*, 19 Ves. 429.

(b) *Springett v. Dashwood*, 2 Giff. 521; *Walker v. Symonds*, 3 Sw. 58,

*per* Lord Eldon; *Newton v. Askew*, 11 Beav. 152; *Gray v. Haig*, 20 Beav. 219; *Burrows v. Walls*, 5 De G. M. & G. 253.



debts, the party entitled subject to the trust may say to the trustee, What estates have you sold? What is the amount of the monies raised? What debts have been paid? &c. (c). It is therefore the bounden duty of the trustee to keep clear and distinct *accounts* of the property he administers, and he exposes himself to great risks by the omission (d). It is the *first duty*, observed Sir T. Plumer, of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect they all stand in the same situation), to be *constantly ready with his accounts* (e).

6. **Sanction of co-trustees' accounts.**—Not only is a trustee bound to render accurate accounts, but if he stand by and sanction the rendering of *improper accounts* by a defaulting trustee, he becomes liable himself for the misrepresentation (f).

7. **Legatee.**—A *legatee*, as being a quasi *cestui que trust*, is entitled to have a satisfactory explanation of the state of the testator's *assets* and an inspection of the *accounts*, but not to require a copy of the accounts at the expense of the estate (g).

(c) *Clarke v. Ormonde*, Jac. 120, per Lord Eldon.

(d) *Freeman v. Fairlie*, 3 Mer. 43, per Lord Eldon.

(e) *Pearse v. Green*, 1 J. & W. 140; and see *Hardwicke v. Vernon*, 14 Ves. 510; *White v. Lincoln*, 8 Ves. 363; *Turner v. Corney*, 5 Beav. 515; *Anon.* 4 Mad. 273; *Jeffreys v. Marshall*, 23 L. T. N. S. 548; 19 W. R. 94; *Underwood v. Trower*, W. N. 1867, p. 83. As to the costs of suits arising out of a refusal to render accounts, see *Springett v. Dashwood*, 2 Giff. 521, and the cases there cited;

*Kemp v. Burn*, 4 Giff. 348; *Wroe v. Seed*, 4 Giff. 425; *Payne v. Evens*, 18 L. R. Eq. 356; *Heugh v. Scard*, 33 L. T. N. S. 659; 24 W. R. 51; and *Jeffreys v. Marshall*, *ubi supra*. In taking accounts against the trustee after a long lapse of time, the Court will show every indulgence it can to the trustee for enabling him to clear his accounts, *Banks v. Cartwright*, 15 W. R. 417.

(f) *Horton v. Brocklehurst* (No. 2), 29 Beav. 504.

(g) *Ottley v. Gilby*, 8 Beav. 602.

## PROPERTIES OF THE CESTUI QUE TRUST'S ESTATE.

WE shall next enter upon the properties of the *cestui que trust's* estate as affected by the *acts of the cestui que trust*, or by *operation of law*.

## SECTION I.

## OF ASSIGNMENT.

Under this head we shall treat: *First*. Of the *assignable quality* of an equitable interest; *Secondly*. Of the rule that the assignee of an equity is *bound by all the equities* affecting it; *Thirdly*. Of *Notice*; and, *Fourthly*. Of the rule *Qui prior est tempore potior est jure*.

*First*. Of the *assignable quality* of an equitable interest.<sup>1</sup>

1. **General rule.** — It may be laid down as a general rule that an equitable interest may be assigned, though it be a mere possibility (*a*), and that either with or without the intervention of the trustee (*b*). And the assignee of the *cestui que trust* may call upon the trustee to clothe the equitable interest with the legal estate, and on his refusal may by suit compel a conveyance without making the assignor a

(a) *Courthorpe v. Heyman*, Cart. 25; *Warmstrey v. Tanfield*, 1 Ch. Rep. 29; *Goring v. Bickerstaff*, 1 Ch. Ca. 8; *Cornbury v. Middleton*, Ib. 211; *per Judges Wyld and Rainsford*; *Burgess v. Wheate*, 1 Eden, 195, *per* Sir T. Clarke; 21 Vin. Ab. 516, pl. 1; *Smith v. Grant*, W. N. 1874, pp. 78, 120.

(b) *Phillips v. Brydges*, 3 Ves. 127, *per* Lord Alvanley.

<sup>1</sup> *Kane Co. v. Herrington*, 50 Ill. 232; *Clapper v. House*, 6 Paige, 149; *Cogswell v. Cogswell*, 2 Ed. Ch. 231; *McKissick v. Pickle*, 4 Harris, 140; *Kent v. Mahaffey*, 10 Ohio St. 204; *Devin v. Hendershott*, 32 Ia. 192.

party (*c*). But a mere right to sue a trustee for an alleged breach of trust, and which right is not annexed to any transfer of the trust estate, or any part thereof, is not assignable, or at least will not pass by a deed for 5s. consideration so as to enable the nominal purchaser to sue in respect of it (*d*).

[\*693] \* 2. **Restraint of alienation.**—A restriction *against alienation* (except in the case of a married woman) will have no more effect in equitable than in legal interests, but will be rejected as contravening the policy of the law (*a*), but in a limitation to the separate use of a *feme covert*, in order to give full effect to the estate itself, a clause against anticipation *during the coverture* is allowed (*b*).

3. **Equitable interest in land.**—As to *lands*, the transfer of an equitable interest might before the Statute of Frauds have been made by parol, but now by the 9th section of the Act all grants and assignments of any trust or confidence are required to be in *writing signed by the party granting or assigning the same*, or else are utterly void. A writing, therefore, is all that is necessary, but it is the practice to employ the same species of instrument, and the same form of words in the transfer of equitable as of legal estates.

4. 8 & 9 Vict. c. 106.—A recent statute (*c*) enacts that an assignment of a chattel interest in lands not being copyhold shall be void *at law* unless made by *deed*, but it is conceived that this enactment affects *legal* interests only, and that the legislature cannot have intended to require a more solemn instrument for the assignment of an equitable chattel interest than for the conveyance of the equitable fee.

5. **Equitable entail.**—The power of an equitable *tenant in tail* to dispose of the equitable fee simple has been differently viewed at different periods. At common law all inheritable estates were in fee simple, and it was the statute *de donis (d)*

(*c*) Goodson v. Ellison, 3 Russ. 583; Jones v. Farrell, 1 De G. & J. 208.

(*d*) Hill v. Boyle, 4 L. R. Eq. 260.

(*a*) Snowden v. Dales, 6 Sim. 524; Green v. Spicer, 1 R. & M. 395;

Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Ves. 429; Rochford v. Hackman, 9 Hare, 480.

(*b*) See *infra*, chap. xxvii., s. 6.

(*c*) 8 & 9 Vict. c. 106, s. 3.

(*d*) 13 Ed. 1, st. 1, c. 1.

that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, and in default of issue to B. would have been construed a fee simple conditional and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred. After much fluctuation (e), it was finally established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trusts by analogy to the statute *de donis*, a Court of equity was bound to follow the analogy throughout, and therefore that a tenant in tail of a trust could not bar his issue, or the \* remainderman, except by an assurance analogous to one, which would have been a bar had the entail been of the legal estate.

6. **Summary of the law before the late Fines and Recoveries Act.** — The doctrines of equity, as finally settled upon this principle, were as follows: —

a. For a good *equitable recovery* there must have been an *equitable tenant to the præcipe*, that is the beneficial owner (a) of the first equitable freehold must necessarily have concurred (b).

β. An equitable recovery was a bar to *equitable* only and not to *legal* remainders (c).

γ. An equitable recovery was not vitiated by the circumstance that the *equitable tenant to the præcipe* had also the *legal freehold* (d).

(e) See an account of the fluctuation in 3d edit. p. 601–604.

(a) *Penny v. Allen*, 7 De G. M. & G. 425.

(b) *North v. Williams*, 2 Ch. Ca. 64, per Lord Nottingham; *Highway v. Banner*, 1 B. C. C. 586; and see *Wickham v. Wickham*, 18 Ves. 418.

(c) *Phillips v. Brydges*, 3 Ves. 128, per Lord Alvanley; *Salvin v. Thornton*, Amb. 585; S. C. 1 B. C. C. 73, note.

(d) *Phillips v. Brydges*, 3 Ves. 126, per Lord Alvanley; 2 Ch. Ca. 49; *Marwood v. Turner*, 3 P. W. 171; *Goodrick v. Brown*, 2 Ch. Ca. 49; S. C. Freem. 180.

δ. An *equitable remainder* was well barred, though it was vested in a person who *had also the legal fee* (e).

7. **Fines and Recoveries Act.** — At the present day, by the operation of the Fines and Recoveries Act (f), the *equitable tenant in tail* may dispose of the equitable fee by the same modes of assurance and with the same formalities as if he were tenant in tail of the *legal estate*.

8. **Inrolment of disentailing deed of copyholds.** — A deed to bar the entail of an equitable interest in *copyholds* must, though not so *expressly* enacted, be entered on the court rolls *within six calendar months* from the date thereof (g).

9. **Estates pur autre vie.** — An estate *pur autre vie* was not even at law within the statute *de donis*; but a *quasi entail* (an estate of a most anomalous character) was introduced into legal estates, and was thence imported into trusts. The present doctrine of the Court appears to be this.

a. If *quasi tenant in tail in equity*, with remainder over, be in *possession*, he may at any time, by a simple conveyance, dispose of the absolute interest, as against the issue, and the remainderman, and may even bind them in equity by his contract.

β. But if *quasi tenant in tail* be in *remainder* after a prior estate under the same settlement, he must have the consent of the tenant for life or other precedent freeholder, as otherwise, though he may bind his issue, he cannot destroy the remainder.

γ. If lands held *pur autre vie* be limited to or in trust for A. and the heirs of his body with remainder over, the [\*695] entirety of the estate \* is vested in A., and the issue and the remainderman stand in the light of mere special occupants, that is, they have no title *jure suo* to any present interest, but merely take the estate by devolution where the owner has made no disposition.

δ. A limitation in *quasi entail* of an estate *pur autre vie* has been commonly assimilated to an estate in fee-conditional; but the natures of the two estates are not to be con-

(e) *Philips v. Brydges*, 3 Ves. 120;  
*Robinson v. Comyns*, Cas. t. Talb.  
 164; S. C. 1 Atk. 172.

(f) 3 & 4 Will. 4, c. 74.

(g) *Honywood v. Foster*, 30 Beav.  
 (No. 1), 1.

founded. The tenant of a fee-conditional can only aliene after issue born, but tenant in *quasi* entail *pur autre vie* may dispose absolutely as above without reference to the fact of their being issue or not (a).

**Assignee bound by all equities.** — *Secondly.* The assignee of an equity is bound by all the equities affecting it (b).<sup>1</sup>

1. In order to understand the limits of the rule, it will be necessary before entering upon the cases to make a few preliminary remarks.

**General observations upon the rule.** — If A. be possessed of a legal *chose in action* (c), as if he be obligee of a bond, and assign it in equity for valuable consideration, here at the time of the assignment no equity existed in A.; and yet, as this case is confessedly within the operation of the rule, the

(a) See the law upon this subject collected by Lord St. Leonards in *Allen v. Allen*, 1 Conn. & Laws. 427; and see *Edwards v. Champion*, 1 Eq. Rep. 419; *Betty v. Humphreys*, 9 I. R. Eq. 332; *Batteste v. Maunsell*, 10 I. R. Eq. 97, 314; [*Re Barber's Settled Estates*, 18 Ch. D. 624; *Blackhall v. Gibson*, 2 L. R. Ir. 49].

[(b) A right of set off subsisting between the assignor and the person against whom the equity is enforceable being a right not attaching to the

equity, but personal to the parties, will not affect the assignee, *Beresford v. Chambers*, 5 Ir. Eq. R. 482; *Burrough v. Moss*, 10 B. & C. 558; *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(c) *Choses in action* are now made assignable if notice in writing be given to the debtor or trustee, [but they are expressly made subject in the hands of the assignee to the subsisting equities]. See 36 & 37 Vict. c. 66, s. 25, subs. 6.

<sup>1</sup> A purchaser will take subject to all the equities or charges upon an estate, if he have notice of them; *Wright v. Dame*, 22 Pick. 55; *Caldwell v. Carrington*, 9 Pet. 86; *Wormley v. Wormley*, 8 Wheat. 421; *Smith v. Walser*, 49 Mo. 250; *Peebles v. Reading*, 8 Serg. & R. 495; *Jones v. Shaddock*, 41 Ala. 262; *Lyford v. Thurston*, 16 N. H. 399. If a transfer is procured by fraud, the purchaser or grantee becomes a trustee; *Sadler's App.* 87 Pa. St. 154; *Lyons v. Bodenhamer*, 7 Kans. 455; *Smith v. Bowen*, 35 N. Y. 83. A purchaser without notice, if for valuable consideration, is entitled to his priority, not only at law, but in equity as well; *Dana v. Newhall*, 13 Mass. 498; *Boone v. Chiles*, 10 Pet. 177; *Griffith v. Griffith*, 9 Paige, 315; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Boynton v. Rees*, 8 Pick. 329; *High v. Batte*, 10 Yerg. 335; *Trull v. Bigelow*, 16 Mass. 406. But a legal title controls as against equities; *Vattier v. Hinde*, 7 Pet. 252; *Flagg v. Mann*, 2 Sumn. 486; *Wailles v. Cooper*, 24 Miss. 208; *Shirras v. Caig*, 7 Cranch, 48; *Daniel v. Hollingshead*, 16 Ga. 190. The consideration must be a valuable one; *Patton v. Moore*, 32 N. H. 382; *Swan v. Ligan*, 1 McCord Ch. 232; *Frost v. Beekman*, 1 Johns. Ch. 288; *Boon v. Barnes*, 23 Miss. 136. All the

maxim might perhaps be more accurately expressed by saying that the owner of an equity by assignment is bound by all the equities affecting what is assigned.

Again, if A., having a debt due to him, or being entitled to an equitable interest, charges it in favour of B., the equity which remains in A. is the debt or equitable interest subject to the charge. If, therefore, A. afterwards assign the same subject matter to C., it might be thought that C. could take nothing more than the interest of A. subject to the charge. This, however, is not the case, for the priorities of B. and C. will be regulated by the better or inferior equities of the respective parties. The rule does not mean that the assignee of an equity shall be bound by all the equities affecting [\*696] the assignor as between him and previous purchasers or incumbrancers under the assignor, but only by such as affect the assignor as between himself and his debtor and any persons not claiming under himself. The assignor can indisputably only give what he himself has, but as between two persons claiming through him a conflict of right may well arise. This will be better understood by the instances exemplifying the rule to which we now proceed.

2. **Transfer of equitable mortgage.** — A person taking an equitable mortgage, with *notice of a prior charge*, transfers his mortgage to another who has no notice of the prior charge. The assignee is bound by the equity with which the assignor was affected (a).

3. **Transfer of equitable interest obtained by fraud.** — A mortgages or sells an equitable interest to B., which mortgage or

(a) *Ford v. White*, 16 Beav. 120.

money should have been actually paid to protect the purchaser; *Wormley v. Wormley*, 8 Wheat. 421; *Wood v. Mann*, 1 Sumn. 506. But see *Parker v. Crittenden*, 37 Conn. 148. If the money is secured, the purchaser is a trustee; *Palmer v. Williams*, 24 Mich. 333; *Rhodes v. Green*, 36 Ind. 10; *Jewett v. Palmer*, 7 John. Ch. 65; *Parkinson v. Hanna*, 7 Blackf. 400. And the title must have passed before notice to protect the purchaser; *Abell v. Howe*, 43 Vt. 403; *Doswell v. Buchanan*, 3 Leigh. 362; *Bush v. Bush*, 3 Strob. Eq. 131. Possibly, if there has been a partial payment, the benefit will result to the purchaser *pro tanto*; *Lewis v. Bradford*, 10 Watts, 67; *Juvenal v. Jackson*, 2 Harris, 519; *Paul v. Fulton*, 25 Mo. 156. And the purchaser will be entitled to an allowance for improvements made; *Farmers' Loan Co. v. Maltby*, 8 Paige, 361; *Everts v. Agnes*, 4 Wis. 343.

sale is *fraudulently* obtained, and then B. transfers to C. Here C., whether he has notice of the fraud or not, takes subject to A.'s equity to have the mortgage or sale set aside (b).

4. **Trustee or cestui que trust debtor to trust estate.**—A trustee or executor has a beneficial interest, but is a *debtor to the trust or executorship*, and then assigns his beneficial interest to a stranger. The assignee cannot claim the beneficial interest without discharging the debt (c). And a similar equity attaches upon an assignee from a *cestui que trust* who is a debtor to the estate (d). [And where at the time of the assignment of a legacy, a suit by the legatee was pending to recall the probate, and the suit failed with costs to be paid by the legatee, the executor was allowed to set off the costs against the legacy notwithstanding the assignment (e). But where assets have been set apart and appropriated by executors to meet a trust legacy, no part of the appropriated assets can be retained or impounded to satisfy a debt from the legatee to the general estate of the testator, for the right of the legatee or his assignee is against the holders of the appropriated assets in their character of trustees, while the liability of the legatee is to \* them [\*697] in their capacity of executors (a).] And where the assignor is a trustee or executor it is immaterial whether the debt to the trust or executorship was contracted before or

(b) *Cockell v. Taylor*, 15 Beav. 103; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Daubeny v. Cockburn*, 1 Mer. 626; see 638; *Parker v. Clarke*, 30 Beav. 54.

(c) *Clack v. Holland*, 19 Beav. 262; *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Cole v. Muddle*, 10 Hare, 186; *Wilkins v. Sibley*, 4 Giff. 442.

(d) *Priddy v. Rose*, 3 Mer. 86; *Willes v. Greenhill* (No. 1), 29 Beav. 376; *Stephens v. Venables* (No. 1), 30 Beav. 625; [*Corr v. Corr*, 3 L. R. Ir. 435; *Re Moore*, 45 L. T. N. S. 406].

[(e) *Re Knapman*, 18 Ch. D. 300. It must be borne in mind that the right to set off costs against costs in another matter or against a money

payment is, in general, subject to the solicitors' lien, and can only be exercised with his consent, or where his interest will not be prejudiced by the exercise; *Ex parte Cleland*, 2 L. R. Ch. App. 808; *Re Harrauld*, 52 L. J. N. S. Ch. 435; 48 L. T. N. S. 352; 53 L. J. N. S. Ch. 505; 51 L. T. N. S. 441. But the lien does not interfere with the right to set off costs payable out of a trust fund against a debt due to that trust, the lien of the solicitor being itself subject to this equitable right of set off; *Re Harrauld*, 53 L. J. N. S. Ch. 505; 51 L. T. N. S. 441.]

[(a) *Ballard v. Marsden*, 14 Ch. D. 374.]



after the assignment of the beneficial interest (*b*). But if the assignor did not become trustee or executor until after the date of the assignment there is no equity against the assignee in respect of a subsequently incurred debt (*c*). If the assignor be a *cestui que trust*, the trustee after notice cannot create any new charge or right of set-off, as between him and the assignor, so as to bind the assignee (*d*).

5. **Debtor and creditor.** — A creditor transfers his debt to a person who has no notice that part of it has been discharged. The assignee is nevertheless bound by the state of the accounts at the time of the assignment (*e*); and when the assignee does not give notice to the debtor of the assignment so as to dissolve the relation of debtor and creditor between the original parties, the assignee is compelled to allow the payments to the creditor subsequent to the assignment (*f*).

[6. **Shares in a Company.** — Shares in a company which are legally transferable are not subject in the hands of a *bonâ fide* transferee without notice, or *semble* in the hands of a person who *bonâ fide* and without notice has for value acquired a legal right to be registered, to equities affecting the transferor (*g*).

In the case of securities issued by companies the following rules seem to apply —

(1). Where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*.

(2). If the security be legally transferable, such an irregularity and *a fortiori* any equity against the original holder cannot be asserted by the company against a *bonâ fide* transferee for value without notice.

(3). Nor can such equity be set up against an equitable transferee, whether the security was transferable at law or

(*b*) *Hopkins v. Gowan*, 1 Moll. 561; *Investment Company*, 3 L. R. Ch. App. 355.  
 (*c*) *Morris v. Livie*, 1 Y. & C. C. C. 380.

(*d*) *Irby v. Irby*, 25 Beav. 632.

(*e*) *Stephens v. Venables* (No. 1), 30 Beav. 625.

(*f*) *Ord v. White*, 3 Beav. 357;  
*Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520; *Re Natal*

(*f*) *Norrish v. Marshall*, 5 Mad. 475; and see *Stocks v. Dobson*, 4 De G. M. & G. 11.

[(*g*) *Briggs v. Massey*, 42 L. T. N. S. 49.]

not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee he has a superior equity.

(4). Nor can such an equity be set up against an equitable transferee of a security, purporting on the face of it to be legally \*transferable, who has taken an [\*698] equitable transfer *bond fide* and without notice from a transferor, who by reason of notice of the irregularity could not have enforced the security. But in this case the transferee can only recover the amount actually advanced or given by him upon the transfer (*a*).]

7. It was decided in the case of *Cavendish v. Geaves* (*b*) that the assignee is liable to the same equities as his assignor, not merely in respect of the actual *payments*, but in regard to the right of *set-off*. In that case Sir John Romilly, M. R. laid down the following canons:

*a*. If a *customer* borrow money from his *bankers*, and give a *bond* to secure it, and afterwards on the balance of his general banking account a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

*β*. If the firm be altered and the *bond* be assigned by the original obligees to the *new firm*, and *notice* of that assignment be given to the *debtor* (*c*), and if, after this, a balance be due to him from the new firm (the assignees of the bond), then no right of set-off exists at law, because the assignment of the *choses in action* would be inoperative at law, and the obligees of the bond and the debtor on the general account are different persons; but as, in equity, the persons entitled to the bond, and the debtors on the general account are the

[(*a*) *Per Kay, J., Re Romford Canal Company*, 24 Ch. D. 85, 92; *Fountain v. Carmarthen Railway Company*, 5 L. R. Eq. 316; *Webb v. Commissioners of Herne Bay*, 5 L. R. Q. B. 642; *Re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Re Blakely Ordnance Company*, 3 L. R. Ch. App. 154; *Dickson v. Swansea*

*Vale Railway Company*, 4 L. R. Q. B. 44; *Higgs v. Northern Assam Tea Company*, 4 L. R. Ex. 387.]

(*b*) 24 Beav. 163, see 173; [see *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98].

(*c*) See as to this, 36 & 37 Vict. c. 66, s. 25.

same persons, a right of set-off exists in equity, and the customer is entitled to set off the balance due to him against the bond debt due from him.

γ. If the *bond* be assigned to *strangers*, and *no notice* of that assignment be given to the original *debtor* (the obligor of the bond), then his rights remain the same. Thus, if the assignment be made to the stranger before any alteration of the firm, then the right of set-off still remains at law, where the obligees of the bond and the debtors on the general account are the same persons, and in equity also, if the matter of account be brought into Chancery, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

[\*699] \*δ. If *notice* of the assignment be given to the original *debtor*, no right of set-off exists in equity for the *balance subsequently due* by the bankers to the obligor; because the persons entitled to the bond are, as the obligor knew, different persons from the debtors to him on the general account, with whom he had continued to deal.

ε. If the assignment of the bond be made to the *new firm*, with *notice* to the *obligor*, the new firm would, if debtors on the general account, be liable to the same rights of set-off in equity as if they had been the obligees.

ζ. If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor, the *bond* be assigned by the new firm to *strangers*, and *no notice* of that second assignment given to the obligor, then the rights of set-off still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it; because the assignees of the bond take it subject to all the equities which affect the assignors.

8. **Set-off.** — It may be observed that the right of *set-off*, though unknown to the common law, was recognised in equity previously to the statutory enactments on the subject. Thus where A. and B. were mutually indebted by *simple contract* dealings, and B. died also indebted to others by simple contract and to one by *specialty*, in such a case, though it was contended that if A. could set off his own debt, he was to

that extent paid in full, in preference to the other simple contract creditors, and at the expense of the specialty creditor, yet a Court of equity presumed an agreement between A. and B. that such set-off should be had, and as B. in his lifetime could not have recovered from A. without the set-off, it held that the personal representative of B. was bound by the same equity (a).

9. **Autre droit.** — Recently the equity jurisdiction in respect of set-off has been chiefly, if not entirely, confined to cases where one or both of the cross demands is or are of an equitable kind (b). And it seems to be established that set-off will not be allowed even in equity where the mutual demands are between the parties in different rights; as if A. give a legacy to B., and appoint C. his executor, or executor and residuary legatee, B. may sue C. for the legacy, and C. cannot set off a debt owing by B. to C. not as executor but in C.'s own \*right (a). [So where an executorship [\*700] account was kept with bankers in the joint names of two executors, one of whom was the residuary legatee under the will, but the executorship account had never been wound up so as to make the executors mere trustees for the residuary legatee, on the failure of the bankers it was held that the

(a) *Downham v. Matthews*, Pr. Ch. 580; see *Jeffs v. Woods*, 2 P. W. 128; and see 2 G. 2, c. 22; 8 G. 2, c. 24, s. 5; [since repealed by 42 & 43 Vict. c. 59, and 46 & 47 Vict. c. 49; and see 36 & 37 Vict. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.]

(b) See now 36 & 37 Vict. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.

(a) *Whittaker v. Rush*, Amb. 407; *Bishop v. Church*, 3 Atk. 691; *Freeman v. Lomas*, 9 Hare, 109; *Chapman v. Derby*, 2 Vern. 117; *Medlicott v. Bower*, 1 Ves. 207; *Middleton v. Pollock*, 20 L. R. Eq. 29; [Ballard v. Marsden, 14 Ch. D. 374.] *Cherry v. Boulton*, 4 M. & Cr. 442, which was questioned by V.C. Wigram in *Freeman v. Lomas*, 9 Hare, 115, turned on the facts that C. F. Boulton never proved her debt so as to make it a

liability of the assignees, and that T. Boulton never obtained his certificate, so that his liability remained, and thus the legacy was owing to one set of persons, viz., the assignees, and the debt from another, viz., T. Boulton. In *Bell v. Bell*, 17 Sim. 127, it does not appear whether the creditor had or not proved under the insolvency. If he had, the case could not be supported on the authority of *Cherry v. Boulton*, but if he had not it must stand or fall with that case. It is believed that in a subsequent stage of the suit, V.C. Kindersley decided the other way. See also *Stammers v. Elliott*, 3 L. R. Ch. App. 195; *Taylor v. Taylor*, 20 L. R. Eq. 159; [*Re Hodgson*, 9 Ch. D. 673, in which case *Cherry v. Boulton* was followed.]

residuary legatee was not entitled to have another account of his own with the bankers, which was overdrawn, set off against the executorship account; for "the case could not be brought within the rules of equitable set-off or mutual credit, unless the residuary legatee was so much the person beneficially interested that a Court of equity without any terms or further inquiry would have obliged the other executor to transfer the account into the name of the residuary legatee alone" (*b*). But where, at the time of the failure of a bank, two accounts were standing in the name of a customer, one his private account, which was overdrawn, and the other an executorship account, and the executor, who was also residuary legatee, had assets in his hand independently of the balance at the bank more than sufficient to satisfy the pecuniary legacies and all other claims against the estate, it was held that he was entitled to set off the one account against the other, on the ground that there was a clear legal right of set-off, and that there were no such equities affecting the monies standing to the executorship account as to prevent the customer from treating the balance as a fund to which he was beneficially as well as legally entitled (*c*).

[\*701] And] a \*defendant may make such admissions in his answer as to preclude himself from objecting to the set-off at the hearing (*a*). However, an admission of assets for payment of the legacy will not have that effect (*b*). A legacy to one of the members of a firm may be set off against a debt owing by the firm (*c*). But a legacy to a married woman, and assigned by her under Malins' Act, cannot be retained by the executor as against the assignee

[*(b)* *Ex parte Morier*, 12 Ch. D. 491.]

[*(c)* *Bailey v. Finch*, 7 L. R. Q. B. 34; and see the observations on this case in *Ex parte Morier*, *ubi supra*, where Cotton L.J. observed, "As I understand it, the principle of the decision (whether right or wrong) was this, not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account against which claims

were likely to be made, and that if claims had at the time of the bankruptcy been made against it, they would have prevented the legal right of set-off from arising, but that, as it was not shown there were any equitable claims against the fund, the legal right of set-off could not be interfered with," p. 502.]

(*a*) *Jones v. Mossop*, 3 Hare, 568.

(*b*) *Freeman v. Lomas*, 9 Hare, 109.

(*c*) *Smith v. Smith*, 3 Giff. 263, see 270.

in discharge of a debt by the husband to the testator's estate (*d*). [And a right to damages against an assignor which does not ripen into a debt until after his assignment of a debt due to him, cannot be set off against the debt due to the assignor and assigned by him (*e*).

A person who owes a debt to a bankrupt at the time of his bankruptcy and has no right of set-off, cannot acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt (*f*). And where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy.<sup>1</sup>

10. Where a policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed binding the policy in the hands of the trustees, but it was expressly provided that nothing in the settlement should vest in the trustees any bonus, and H. obtained possession of and misappropriated part of the trust funds, it was held, in an action by the executrix of H. to recover bonuses, that the trustees held the bonuses under a resulting trust independently of the settlement, and could not retain them against the losses incurred in respect of the funds misappropriated by H., and that as the claim of the executrix was in respect of money which was never payable to H. personally, but only after his death, while the claim of the trustees was for money due from him in his lifetime, there was no right of set-off on the footing of mutual debts (*g*).]

*Thirdly. Of Notice*<sup>2</sup> to the Trustee.

1. **Notice.** — As between *assignor and assignee* notice to the trustee is not necessary for the completion of an assign-

(*d*) *Re Batchelor*, 16 L. R. Eq. 481.

[(*e*) *Ex parte Theys*, 22 Ch. D. 122; 25 Ch. D. 587.]

[(*f*) *Per Lord Selborne, L.C., Ex parte Theys*, 25 Ch. D. 592.]

[(*g*) *Hallett v. Hallett*, 13 Ch. D.

232; and see *Rees v. Watts*, 11 Exch. 410; *Newell v. National Provincial*

*Bank of England*, 1 C. P. D. 496.]

<sup>1</sup> *Ex parte Reid*, 33 W. R. 707; 14 Q. B. D. 963.

<sup>2</sup> The pleadings and evidence in reference to notice must be clear and definite; *Alexander v. Pendleton*, 8 Cranch, 462; *Nantz v. McPherson*, 7

ment (*h*), even though the assignment be voluntary (*i*). Nor is notice necessary for the \* purpose of making the assignment effectual as against subsequent volunteers (*a*), or as against persons claiming only a *general equity* under the assignor, such as a judgment creditor who obtains a charging order (*b*). Or equitable execution by the appointment of a receiver subject to existing incumbrances.<sup>1</sup> But the omission of notice may be followed by very dangerous consequences by the operation of the reputed ownership clause under the bankrupt laws (*c*), or the acquisition of priority by subsequent purchasers or incumbrancers. And if the title be a derivative one, and not one that appears upon the face of the instrument creating the settlement, the trustee may, having neither express nor constructive notice, pay upon the footing of the original title, and in that case he cannot be made to pay over again to the assignee under the derivative title (*d*).

(*h*) *Burn v. Carvalho*, 4 M. & Cr. 702; *Bell v. London and North Western Railway Company*, 15 Beav. 552; *Dufaur v. Professional Life Assurance Company*, 25 Beav. 599; *Re Lowe's Settlement*, 30 Beav. 95.

(*i*) *Donaldson v. Donaldson, Kay*, 711.

(*a*) *Justice v. Wynne*, 12 Ir. Ch. Rep. 289; *Re Webb's Policy*, 36 L. J. N. S. Ch. 341.

(*b*) *Scott v. Hastings*, 4 K. & J. 633.

(*c*) 46 & 47 Vict. c. 52, s. 44. [See

*ante*, p. 242; and see *Ex parte Arkwright*, 3 Mont. D. & De G. 129; *Bartlett v. Bartlett*, 1 De G. & J. 127; *Re Webb's Policy*, *ubi sup.*; *Daniel v. Freeman*, 11 I. R. Eq. 233, 638; *Re Irving*, 7 Ch. D. 419; where it was held that the equitable assignment created a trust for the assignee and so took the case out of the order and disposition clause; *Re Power*, 11 L. R. Ir. 83.]

(*d*) *Cothay v. Sydenham*, 2 B. C. C. 391; *Leslie v. Baillie*, 2 Y. & C. C. C. 91; [and see *Re Lord Southamp-*

*T. B. Mon.* 597; *Dillard v. Crocker*, 1 Speers' Eq. 20; *Halstead v. Bank*, 4 J. J. Marsh. 554. Notice to an agent is notice to the principal; *Jackson v. Leek*, 19 Wend. 339; *Astor v. Wells*, 4 Wheat. 466; *Jackson v. Sharp*, 9 Johns. 163; *Hovey v. Blanchard*, 13 N. H. 145; but he must be an agent in the strict sense of the word; *Hood v. Fahnestock*, 8 Watts, 489; *Winchester v. Railroad Co.* 4 Md. 231; *Howard Ins. Co. v. Halsey*, 4 Seld. 271; *Fulton Bank v. Canal Co.* 4 Paige, 127; *Bank v. Payne*, 25 Conn. 444. Any purchaser taking from one who is relieved of any equities attaching to an estate, likewise is free from them; *Church v. Ruland*, 64 Pa. St. 441; *Boynton v. Rees*, 8 Pick. 329; *Fletcher v. Peck*, 6 Cranch, 87; see *Lawrence v. Stratton*, 6 Cush. 163. Constructive notice may be sufficient; *Maul v. Rider*, 59 Pa. St. 167; *Farnsworth v. Childs*, 4 Mass. 637; *Leitch v. Wells*, 48 N. Y. 591; *Calhoun v. Burnett*, 40 Miss. 599.

<sup>1</sup> *Arden v. Arden*, 29 Ch. D. 702.

2. **Priority of charge from priority of notice.** — If the owner of an equitable interest in money or stock, or generally of any *chose in action*, assign it to A., who gives no notice of the transfer to the trustee or debtor, and then for valuable consideration assigns it over again to B., who having had no notice of the prior assignment when he advanced his money, gives notice of his own assignment to the trustee or debtor, in this case B. has priority over A. That a purchaser's notice will secure to him this advantage of priority, has been only settled in modern times. In *Cooper v. Fynmore* (*e*), Sir T. Plumer, V. C., decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shown as, in a Court of equity, would amount to fraud; but in *Dearle v. Hall* (*f*); and *Loveridge v. Cooper* (*g*), nine years after, his Honour, when Master of the Rolls, came to a contrary conclusion, and delivered a very elaborate argument that notice *would* gain priority. His Honour's judgments were affirmed on appeal (*h*), and the doctrine has been recognised in numerous subsequent cases (*i*). [And the same principle applies where the owner of the equitable interest has died after making \* an assignment, and his *legal personal* [\*703] *representative* has made a subsequent assignment of the interest to a purchaser for value without notice of the prior assignment (*a*).]

But the principle does not extend to the shares of companies registered under the Companies Act, 1862, the 30th section of which provides that no notice of any trust expressed, implied, or constructive, shall be entered on the register.<sup>1</sup> The course which the assignee of an equitable interest in such shares should adopt for his protection is to

ton's Estate, Banfather's Claim, 16 Ch. D. 178; *Re Lord Southampton's Estate*, Roper's Claim, 60 L. J. N. S. Ch. 155.]

(*e*) 3 Russ. 60.

(*f*) 3 Russ. 1.

(*g*) *Ib.* 30.

(*h*) *Ib.* 38, 48.

(*i*) *Hutton v. Sandys*, 1 Younge, 602, see 607; *Smith v. Smith*, 2 Cr. & M. 231; *Foster v. Blackstone*, 1 M. & K. 297, see 307. For the principles upon which Sir T. Plumer proceeded, see 3 Russ. pp. 12–14, 20–22.

[(*a*) *Re Freshfield's Trust*, 11 Ch. D. 198.]

<sup>1</sup> *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424.



serve a notice in lieu of *distringas* on the company under 5 Vict. c. 5, s. 5, and Order xlv. of the Rules of the Supreme Court, which will prevent any legal transfer being made of the shares without notice to the equitable assignee, and will give him an opportunity to obtain an order restraining the transfer. It must not however be assumed that the directors of a company may safely ignore a notice given to them, and allow shares, which are to their knowledge affected by equitable rights, to be fraudulently transferred so as to destroy such rights. For if knowledge of the fraud can be brought home to the directors they would be liable as parties to the fraud; and in the opinion of Cotton, L. J., "where directors are asked to register a transfer, which from circumstances in fact known to them at the time would be in violation of the rights of others, they cannot either safely to themselves or without disregard of their duty register the transfer without allowing time for enquiry and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer"; and in the opinion of Lindley, L. J., "a refusal by directors or an omission on their part to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register a transfer for such time as might be necessary to allow him to apply for a proper restraining order, would be *prima facie* improper. Such conduct on the part of directors would be strong evidence of fraud."<sup>1</sup>

3. **As against trustees in bankruptcy.** — This rule as to gaining priority by notice has been held to prevail not only as between two purchasers for value, but also as between a purchaser for value, and the assignees of a bankrupt neglecting to give notice; as, if A. being entitled to an equitable interest become bankrupt, and then assign it to a purchaser for valuable consideration without notice of the bankruptcy, who serves notice on the trustee, the purchaser gains priority over the assignees who gave no notice (*b*). In a case, how-

(*b*) *Re Barr's Trusts*, 4 K. & J. 219; *Re Atkinson*, 4 De G. & Sm. 548; 2 De G. M. & G. 140; *Re Russell's Policy Trusts*, 15 L. R. Eq. 26; [*Palmer v. Locke*, 18 Ch. D. 381;] and see *infra*, p. 711.

<sup>1</sup> S. C. pp. 445, 453. But see the observations of Brett, L. J., S. C. at p. 440.

ever, arising under the Bankruptcy Act of 1849, it was held that an assignment, after bankruptcy, to an assignee who gave notice to the trustee before the assignees in bankruptcy, could not prevail against the title of the latter (*c*); [and in a subsequent case (*d*) where the same view was adopted by the Court of Appeal, L. J. Baggallay held that the 141st section of the Act of 1849, which governed the case, applied equally to all bankruptcies under the Act of 1861.] The judgment of the Court was grounded on the strong negative words in the Act (*e*); but similar words occur in the original Bankrupt Act of James I. (*f*), and the principle of the former decisions was that, as regards *equitable interests*, the Act can pass nothing more than the fullest assignment which the bankrupt could have made, and that *assignees by operation of law* cannot in a Court of equity be viewed as under less obligation to give notice than a *particular assignee*, who, generally speaking, is more favoured. It would seem that the rule as to notice cannot be applied as against assignees in bankruptcy where the subject matter of assignment is a *debt which was recoverable at law* by the bankrupt, since in that case the *legal title* vests in the assignees.

[4. **Solicitor's Lien.**—A solicitor having a lien for costs on documents in his possession is under no obligation to give any further notice of his lien, the fact of his having possession of the documents being notice to all the world of the only fact (*viz.* possession) necessary to raise \* the lien. A subsequent assignee who has given no- [\*704] tice will accordingly not gain priority (*a*).]

5. **Purchase by a trustee without notice.**—If a *cestui que trust* charge his interest, but gives no notice to the trustee, or gives notice to the trustee who dies so that the notice falls to the ground, and then a trustee subsequently ap-

(*c*) *Re Mary Coombe's Will*, 1 Giff. 91.

[(*d*) *Re Bright's Settlement*, 13 Ch. D. 413; see the observations on this case in *Palmer v. Locke*, 18 Ch. D. 381; and in *Re Jakeman's Trusts*, 23 Ch. D. 344.]

(*e*) "And after such appointment

(*i.e.* of assignees) neither the bankrupt, nor any person claiming through or under him, shall have power to recover the same," &c.; 12 & 13 Vict. c. 106, s. 141.

(*f*) 1 Jac. 1, c. 15, s. 13.

[(*a*) *West of England Bank v. Batchelor*, 61 L. J. N. S. Ch. 199.]

pointed and having no notice of the charge, purchases from the *cestui que trust*, or takes a mortgage of his interest, such trustee stands in the position of an assignee, who, having no notice of the prior charge and giving notice of his own charge, gains a priority (*b*).

6. **Cautions in assignment of equitable interests.** — The purchaser of an equitable interest in *choses in action* should, for his security, never dispense with the two following precautions: *First*, he should make enquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance. The purchaser, as the implied agent of the *cestui que trust*, has a right to require all necessary information; and if the trustee or debtor refuse to answer the enquiry (*c*), to be guilty of misrepresentation, or even of mis-statement from forgetfulness, the purchaser may charge him personally with the amount of the consequent loss (*d*). *Secondly*, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if, after such notice, he part with the fund to any person not having a prior claim (*e*).

7. **Notice in respect of real estate.** — Between *choses in action* and *real estate* there is an observable distinction. As regards the former the purchaser knows the legal title is outstanding in a third person, and is therefore bound to give notice of his incumbrance; but in *lands* it often happens that the vendor professes to have the legal ownership in himself, whereas it afterwards appears that it was really vested in

(*b*) Phipps v. Lovegrove, 16 L. R. Eq. 80; London Chartered Bank of Australia v. Lemprière, 4 L. R. P. C. 572.

(*c*) Browne v. Savage, 4 Drew. 639.

(*d*) Burrowes v. Lock, 10 Ves. 470; Browne v. Savage, 5 Jur. N. S. 1020; S. C. 4 Drew. 635; Slim v. Croucher, 1 De G. F. & J. 518.

(*e*) Hodgson v. Hodgson, 2 Keen, 704; Roberts v. Lloyd, 2 Beav. 376; Andrews v. Bousfield, 10 Beav. 511.

some stranger. If the purchaser be not cognizant of the outstanding legal estate, he cannot give notice of his interest, and therefore cannot be held \*to have forfeited his right by having neglected a precaution that was impossible. On the other hand, to hold that the doctrine of notice does not apply at all to real estate, renders any dealings with equitable interests therein needlessly dangerous. Thus A. is entitled to an equitable interest, of which the legal estate is in B. upon trusts requiring B. to retain possession of the title-deeds, and not to part with the legal estate. A. conveys his interest to C., who makes no enquiries about incumbrances, and gives no notice to the trustee; A. afterwards, fraudulently concealing the previous assurance, conveys the same interest to D., who makes enquiries of the trustee respecting incumbrances, and gives him notice of his own charge. There seems no sound reason for postponing D. who has taken these precautions to C., who has merely priority in point of time. It is, however, now settled that the incumbrances in such a case are not governed by the law of notice, but rank *primâ facie*, and in the absence of other controlling equities, in order of date (a). However, the rule as to notice, though not applicable to estates in land, whether freehold or leasehold, applies when the subject matter is a sum of money to arise from a trust for sale of land (b), or which is charged upon land (c).

[8. **Purchaser completing bankrupt's contract without notice of bankruptcy.** — Where a bankrupt before adjudication contracted to sell leasehold property, and received a deposit in respect of the purchase-money, and after the adjudication but before the purchaser had any notice of any act of bankruptcy

(a) *Lee v. Howlett*, 2 K. & J. 531; *Wiltshire v. Rabbits*, 14 Sim. 76; and see *Wilmot v. Pike*, 5 Hare, 14; *Bugden v. Bignold*, 2 Y. & C. C. C. 392; *Rochard v. Fulton*, 7 Ir. Eq. Rep. 131; *Rooper v. Harrison*, 2 K. & J. 86; *Prosser v. Rice*, 28 Beav. 68; *Pease v. Jackson*, 3 L. R. Ch. App. 576; *Phipps v. Lovegrove*, 16 L. R. Eq. 80. As to the effect of notice upon a transfer of railway shares, see

*Dunster v. Lord Glengall*, 3 Ir. Ch. Rep. 47.

(b) *Lee v. Howlett*, 2 K. & J. 531; *The Consolidated Investment, &c. Company v. Riley*, 1 Giff. 371; *Foster v. Blackstone*, 1 M. & K. 297, 9 Bligh, N. S. 332; *Arden v. Arden*, 29 Ch. D. 702.

(c) *Re Hughes's Trust*, 2 H. & M. 89; [*Daniel v. Freeman*, 11 I. R. Eq. 233, 638.]

received the balance of the purchase-money from the purchaser, it was held that the trustee in bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying him the purchase-money. The equity of the purchaser under the contract was to have the property conveyed to him upon payment of the purchase-money to the person to whom the property belonged; and it was the purchaser's misfortune if he paid the money to a person who had ceased to be the owner of the property (*d*).]

9. **Second incumbrancer giving notice but making no enquiries.**—A second incumbrancer who advances his money *without enquiry* as to the existence of previous [\*706] charges, but afterwards, \*and before any notice given by the first incumbrancer, gives notice of his own security, obtains thereby priority (*a*). The reason is, that, in the case supposed, non-enquiry by the second incumbrancer is immaterial, since the answer to any enquiry would have been that there were no prior charges, whereas the absence of notice by the first incumbrancer works an *ex post facto* injury to the second, who, if informed at the time of giving his own notice of the existence of the earlier charge, would immediately have exerted himself to obtain repayment of his money (*b*).

10. **Notice to one of several co-trustees.**—If notice be given to *one of several* co-trustees, it is sufficient as against all subsequent incumbrancers *during the lifetime of that trustee*; for the subsequent incumbrancer should have made enquiry of *all* the trustees, and if he had done so he would have come to a knowledge of the prior charge, so that *here* non-enquiry is material (*c*).

11. **Death of the single trustee to whom notice was given.**—But if a prior incumbrancer content himself with giving

[(*d*) *Ex parte Rabbidge*, 8 Ch. D. 367.]

(*a*) *Foster v. Blackstone*, 1 M. & K. 297; *Foster v. Cockerell*, 9 Bligh, N. S. 376; *Timson v. Ramsbottom*, 2 Keen, 49; and see *Etty v. Bridges*, 2 Y. & C. C. C. 494; *Warburton v. Hill*, Kay, 478.

(*b*) *Meux v. Bell*, 1 Hare, 86, 87.

(*c*) *Smith v. Smith*, 2 Cr. & M. 231; *Ex parte Rogers*, 8 De G. M. & G. 271; *Willes v. Greenhill* (No. 2), 29 Beav. 387; S. C. 4 De G. F. & J. 147; and see *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Wise v. Wise*, 2 Jon. & Lat. 412.

notice to *one* of the trustees, and that trustee *dies*, and a second incumbrancer gives notice of his assignment, then, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer had no means in his power of detecting the fraud, the loss will fall on the person who had so far occasioned that he might have prevented it (*d*).

12. **Enquiry by incoming trustees of outgoing trustees.** — If there be two trustees, and notice be given to *both of them*, and then one dies and the other retires, and new trustees are appointed in the place of both, and the new trustees having no notice of the charge distribute the fund; the incumbrancer cannot hold the *new trustees liable* as for a misapplication on the ground that, when appointed, they ought to have enquired of the retiring trustee whether he had notice of any charge in which case it would have come to their knowledge (*e*).

13. **Where the assignor or assignee is one of the trustees.** — As the rule requiring notice is not only to prevent the trustees from parting with the fund, but also and more particularly to enable future purchasers to ascertain prior incumbrances, it has been held that where the *assignor*, the party beneficially \*interested, is also one of the trus- [707] tees, the notice which he has is not sufficient, as it is so strongly his interest to suppress the assignment. But if the *assignee* be one of the trustees, the notice which *he* has is sufficient, for he will of course, for his own protection, take care to apprise future incumbrancers of the assignment to himself (*a*).

[A trustee having himself a charge upon the trust fund is not, in the absence of enquiry, bound to communicate that charge to a person giving him notice of a subsequent

(*d*) See *Meux v. Bell*, 1 Hare, 73; *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Timson v. Ramsbottom*, 2 Keen, 35; [*Re Hall*, 7 L. R. Ir. 180;] but see *Willes v. Greenhill* (No. 2), 29 Beav. 387.

(*e*) *Phipps v. Lovegrove*, 16 L. R. Eq. 80.

(*a*) *Browne v. Savage*, 4 Drew. 635; *Willes v. Greenhill* (No. 1), 29 Beav. 376; S. C. (No. 2), 29 Beav. 391; *Newman v. Newman*, 28 Ch. D. 674.

charge (b); but a trustee concealing his own prior charge would be narrowly watched by the Court, and it is conceived that if by his conduct he had led the subsequent incumbrancer to believe the fund to be unincumbered, he would lose his priority.]

14. **Notice to all the trustees, and all dying.** — As an incumbrancer may, by giving notice to one trustee, complete his title for the time, and yet may afterwards, by the death of the trustee be displaced; so, if notice be sent to *all* the trustees, and they *all* die, a second incumbrancer, who gives notice to the succeeding trustees, will gain priority. Notice properly given at the time does not make an absolute title, but one liable to be defeated by an alteration of circumstances (c). An incumbrancer, therefore, would do well not only to give notice to *all* the trustees in the first instance, but to watch as well as he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a set of trustees of whom there is not at least *one* who has notice of his charge.

15. **Time of giving notice.** — Notice of an equitable incumbrance ought to be given to the trustees as early as possible, but if delayed for any length of time, it will be equally efficacious, provided no notice of any other charge has been served in the interval (d). Therefore, if the owner of an equitable interest, but who has given no notice to the trustees, contract for the sale of it, the purchaser cannot object to the title on the ground of no notice having been given, unless he can show some intermediate incumbrance; but it is the vendor's duty, by pointing out who have been the trustees from time to time, to furnish full means to the purchaser of enquiring whether or no any such charge has been created (e).

[\*708] \*16. **Notice to a person about to become a trustee.**

— Notice to a person who is *not actual trustee at the*

[(b) *Re Lewer*, 4 Ch. D. 101; 5 Ch. D. 61.]

(c) *Phipps v. Lovegrove*, 16 L. R. Eq. 80; and see *Meux v. Bell*, 1 Hare, 97; but see *Etty v. Bridges*, 2 Y. & C. C. C. 492; *Browne v. Savage*, 4

*Drew*. 635; *Re Durand's Trusts*, 8 W. R. 33.

(d) *Meux v. Bell*, 1 Hare, 86, per Sir J. Wigram; *Browne v. Savage*, 5 Jur. N. S. 1020; and see *Stocks v. Dobson*, 4 De G. M. & G. 17.

(e) *Hobson v. Bell*, 2 Beav. 17.

time, but who may and probably will become such, confers no right to priority. Thus, where A. had a first charge, and B. the second charge, on the proceeds to arise from the sale of an officer's commission; and B. first, and then A., gave notice of their respective charges to the army agent of the regiment; but both notices preceded the time when the army agent first actually assumed the character of trustee; it was held that A. retained his priority (*a*). [Where an officer retires under "The Regulation of the Forces Act, 1871" (*b*), the amount payable on his retirement, though previously lodged with the army agents and entered in their books under the officer's name, cannot be affected by notice of an incumbrance created by him until after his retirement is gazetted (*c*). But as soon as the retirement is gazetted, the amount lodged becomes the money of the retiring officer in the hands of the army agents, and is liable to set-off in respect of any monies owing by the officer to the army agents (*d*).]

17. These cases do not disturb the great principle that an equitable assignment is complete, if notice be given to the person by whom payment of the assigned debt is to be made, whether that person be himself liable, or is merely charged with the duty of making the payment; and it is not material whether the right to receive the money and the consequent obligation to pay is at the time when the notice is given absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation at the time when notice reaches him to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied. The cases on the sales of commissions turn upon the fact that the notice was given to a mere *possible* agent before he was an *actual* agent, — before the time when he was in any sense liable to make payment, neither being himself a

(*a*) *Addison v. Cox*, 8 L. R. Ch. App. 76; *Buller v. Plunkett*, 1 J. & H. 441; *Webster v. Webster*, 31 Beav. 393; *Somerset v. Cox*, 33 Beav. 634; [*Roxburghe v. Cox*, 17 Ch. D. 520;] and see *Calisher v. Forbes*, 7 L. R. Ch. App. 109; *Yates v. Cox*, 17 W. R. 20.  
 [(*b*) 34 & 35 Vict. c. 86.]  
 [(*c*) *Johnstone v. Cox*, 10 Ch. D. 571; 19 Ch. D. 17.]  
 [(*d*) *Roxburghe v. Cox*, 17 Ch. D. 520.]



debtor nor at that time charged with the duty of paying the money in question (*e*).

18. **Notice as between volunteers.**—The doctrine of priority by notice applies only in favour of *purchasers*; for as between two *volunteers* notice is not necessary, but *qui prior est tempore potior est jure*, whether the first assignee did or not give notice (*f*).

[\*709] \*19. **Simultaneous notices.**—Where two or more notices are served simultaneously, the incumbrances rank according to their respective dates (*a*).

20. **To whom notice should be given.**—The notice, written or unwritten (*b*), but better written, should be given to the trustees themselves, [and notice to the solicitors of the trustees will be of no effect unless the solicitors are expressly or impliedly authorised to receive such notices (*c*);] and where there are *two settlements*, one original and the other derivative, the notice should be given to the trustees of the original settlement who hold the property (*d*). Where notice to one trustee would be sufficient, it may be given to one who is not the acting trustee, the law recognising no distinction between an acting and a passive trustee (*e*). Where the trust fund consists of shares in a *company*, the notice may be sent to the *secretary* (*f*); but notice to A., a *director*, and B., the *actuary*, was in one case considered sufficient (*g*);

(*e*) *Addison v. Cox*, 8 L. R. Ch. App. 79, *per* L. C. Selborne.

(*f*) *Justice v. Wynne*, 12 Ir. Ch. Rep. 289. This was so laid down by L. C. Brady, and his opinion carries the greater weight with it, as at the original hearing he had thought otherwise; see S. C. 10 Ir. Ch. Rep. 489.

(*a*) *Calisher v. Forbes*, 7 L. R. Ch. App. 109; [*Johnstone v. Cox*, 16 Ch. D. 571; 19 Ch. D. 17.]

(*b*) *Smith v. Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 Deac. & Ch. 357, *per* Sir G. Rose; S. C. 1 Mont. & Ayr. 695, note, *per eundem*; *Browne v. Savage*, 4 Drew. 640; *Re Tichener*, 35 Beav. 317; *Re Agra Bank*, 3 L. R. Ch. App. 555.

[(*c*) *Saffron Walden Second Benefit Building Society v. Rayner*, 14 Ch. D. 406; *Arden v. Arden*, 29 Ch. D. 702; and see *Re Durand's Trusts*, 8 W. R. 33;] *Foster v. Blackstone*, 1 M. & K. 297, 306; *Rickards v. Gledstones*, 3 Giff. 298; *Willes v. Greenhill* (No. 2), 29 Beav. 392.

(*d*) *Bridge v. Beadon*, 3 L. R. Eq. 664.

(*e*) *Smith v. Smith*, 2 Cr. & M. 233.

(*f*) *Ex parte Stright*, Mont. 502; and see *Alletson v. Chichester*, 10 L. R. C. P. 319.

(*g*) *Ex parte Watkins*, 1 Mont. & Ayr. 689; S. C. 4 Deac. & Ch. 87; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

and, in another, notice to A., one of the directors, and B., an *auditor* (*h*); and in another verbal notice, not casually, but in the way of business, to the *board of directors* (*i*). But the fact that the secretary or any other officer of the company had casual knowledge, acquired in his individual capacity and not whilst engaged in transacting the business of the company, of any matter, will not affect the company with notice of it.<sup>1</sup> It was at one time held that, as notice to a *partner* was notice to the partnership, if by the constitution of an assurance office the person insuring became a partner, the assignment of a policy by him was *ipso facto* notice of it to the society (*j*); but this was going very far, as it was the assignor's interest to suppress the assignment, and the point has since been ruled the other way (*k*). The negotiation for the assignment through a solicitor, who happens to be the local agent of the insurance office, is not notice to the \* office (*a*). *Incidental* mention of the charge to a [\*710] *clerk* of the company, though in the office of business, will not be constructive notice to the company itself (*b*); and the fact that the solicitor to the trustees was a creditor under an insolvency, and must have known of the insolvency, was no notice of it to the trustees (*c*).

21. **Notice must be clear.**—If the notice be by parol it must be clear and distinct (*d*), [and sufficient to bring to the mind of the trustee an intelligent apprehension of the nature of the dealing with the trust property, so that

(*h*) *Ex parte* Waithman, 4 Deac. & Ch. 412; but see *Ex parte* Hennessey, 1 Conn. & Laws. 559.

(*i*) *Re* Agra Bank, 3 L. R. Ch. App. 555; and see *Ex parte* Richardson, Mont. & Ch. 43; *Alletson v. Chester*, 10 L. R. C. P. 319.

(*j*) *Duncan v. Chamberlayne*, 11 Sim. 128; *Ex parte* Rose, 2 Mont. D. & De G. 131, and see *Ex parte* Cooper, Id. 1; *Re* Styant, Ib. 219, and 1 Ph. 105.

(*k*) *Ex parte* Hennessey, 1 Conn. & Laws. 559; *Thompson v. Speirs*,

13 Sim. 469; *Martin v. Sedgwick*, 9 Beav. 333; and see *Powles v. Page*, 3 C. B. 16; *Ex parte* Boulton, 1 De G. & J. 175.

(*a*) *Re* Russell's Policy Trusts, 15 L. R. Eq. 26.

(*b*) *Ex parte* Carbis, 4 Deac. & Ch. 354; S. C. 1 Mont. & Ayr. 693, note (*a*).

(*c*) *Re* Brown's Trust, 5 L. R. Eq. 88.

(*d*) *Re* Tichener, 35 Beav. 317; *Re* Brown's Trust, 5 L. R. Eq. 88.

<sup>1</sup> *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424.

he may regulate his conduct by it in the execution of the trust (e).

An error in the notice in an immaterial point, such as the date of the deed of which notice is given, will not invalidate it (f).]

22. **By whom notice should be given.**—It was held by Lord Romilly, M. R., that the notice should be given by or on behalf of the *assignee himself*, and that notice to a trustee proceeding from a mere *stranger* would be insufficient (g), but the case on appeal was reversed on the ground that the trustee *had received such notice* as he would or should have acted upon (h).

23. **Where trustee is incumbrancer.**—Where the trustee himself is the assignee or incumbrancer, the transaction necessarily carries notice along with it, and no other notice is necessary (i). So in the case of a *Joint Stock Bank*, the lien of the bank under the deed of settlement for a debt owing from one of its members, does not require any further notice than that which the bank, the only trustee, already possesses from the relative position of the parties (j).

24. **Form of the notice.**—The notice, if it goes into details at all, should set forth the entire amount of the assignee's claim, for it has been held that the trustee is affected by notice only of the amount stated upon the face of the memorandum served, and not by notice of all the contents of the instrument to which the memorandum refers (k). But notice of a charge in *general terms* without expressing any amount in particular, will be sufficient (l); and if there be no doubt as to the fund intended, a *mistake* in the description will not

vitiating the notice as against a subsequent purchaser, [\*711] but the \* Court will not extend the security beyond

[(e) *Lloyd v. Banks*, 3 L. R. Ch. App. 488, 490; *Saffron Walden Second Benefit Building Society v. Rayner*, 14 Ch. D. 406.]

[(f) *Whittingstall v. King*, 46 L. T. N. S. 520.]

(g) *Lloyd v. Banks*, 4 L. R. Eq. 222, 3 L. R. Ch. App. 488.

(h) 3 L. R. Ch. App. 488.

(i) *Elder v. Maclean*, 3 Jur. N. S. 283; *Ex parte Smith*, 4 Deac. & Ch. 579; *Ex parte Smart*, 2 Mont. & Ayr. 60.

(j) *Assignees of Dunne v. Hibernian Joint Stock Company*, 2 Ir. Rep. Eq. 82.

(k) *Re Bright's Trust*, 21 Beav. 430.

(l) *Ib.* 434.

the amount of the sum mentioned in the notice as intended to be charged (a).

25. **Case of the fund being in Court.** — Where the fund is in Court the step equivalent to notice is the obtaining of a *stop-order* to restrain the transfer of the fund, and as between two assignees the one who first gets a stop-order will have priority (b); [though the other may have given prior notice to the trustees of the settlement (c); and] though the first stop-order was upon the general fund, and the second stop-order was the first upon the share when carried over to the separate account of the debtor and his incumbrancers (d); and trustees in bankruptcy who claim under the order and disposition clause in the Bankruptcy Act will lose the benefit of the transfer to them, if an assignee for value give notice to the Court of his incumbrance before any notice is given of the assignment under the bankruptcy (e); but the incumbrancer who obtains the first stop-order will not prevail over an incumbrancer who gave the regular notice to the representative of the trust *before the money was paid into Court* (f); [nor will he prevail over a prior incumbrancer of whose incumbrance he had notice at the time of making his advance (g).] And even after the money has been paid into Court, although the *legal* title is in the *Paymaster-General* (h), the *trustees* remain such for the purposes of *notice*, and priority may be gained by serving notice upon the trustees (i).

[But where part of the trust estate was in Court and part in the hands of the trustees, and a first mortgagee gave notice

(a) *Woodburn v. Grant*, 22 Beav. 483.

(b) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463; *Elder v. Maclean*, 3 Jur. N. S. 283.

[(c) *Pinnock v. Bailey*, 23 Ch. D. 497.]

(d) *Lister v. Tidd*, 4 L. R. Eq. 462.

(e) *Stuart v. Cockerell*, 8 L. R. Eq. 607; and see *supra*, note (b), p. 703.

(f) *Livesey v. Harding*, 23 Beav. 141; *Brearcliff v. Dorrington*, 4 De

G. & Sm. 122; and in *Thomas v. Cross*, 2 Dr. & Sm. 423, the same doctrine was applied as between two judgment creditors.

[(g) *Re Holmes*, W. N. 1885, p. 6.]

(h) *Thorndike v. Hunt*, 3 De G. & J. 563.

(i) *Thompson v. Tomkins*, 2 Dr. & Sm. 8; *Matthews v. Gabb*, 15 Sim. 51; *Warburton v. Hill, Kay*, 477; *Bartlett v. Bartlett*, 1 De G. & J. 127; [but see *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686.]

to the trustees but did not obtain a stop-order, and a subsequent incumbrancer both gave notice and obtained a stop-order, the first mortgagee had priority as to the funds in the hands of the trustees, and the second mortgagee had priority as to the fund in Court (j).]

26. **Notice to trustee, where fund in Court and neither assignee obtains a stop-order, confers priority.** — Should an incumbrancer give *notice* to the trustees, but *neglect to obtain a stop-order*, he will still take precedence of a prior incumbrancer, who has neither obtained an order nor given notice, or who had given notice to only one of several trustees, and that \*trustee had died before the time of the second incumbrance. It is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected to the detriment of the second incumbrancer, while the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice (a).

27. **Precaution where the fund is in Court.** — If the trust fund be in Court, the following course should be adopted. The intended assignee should enquire at the Paymaster-General's and Registrar's offices whether any stop-order has been made to restrain the transfer of the fund, and *also* of the trustees, whether notice has been given of any prior incumbrance; and, on the completion of his own assignment, he should give notice to the trustees personally, and obtain a stop-order himself, and leave it at the Paymaster-General's office to be entered. If the Paymaster-General's office is closed, the order should still be entered at the Registrar's office (b). The enquiry at the Paymaster-General's or Registrar's offices is merely for the purchaser's greater satisfaction, and makes no part of his own title, for neither the Paymaster-General nor the Registrar is the trustee, but the Court is

[(j) *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686.]

(a) *Timson v. Ramsbottom*, MS.; S. C. 2 Keen, 35, pp. 49 and 50; *Matthews v. Gabb*, 15 Sim. 51; [*Re Hall*, 7 L. R. Ir. 180.]

(b) As to the practice respecting stop-orders (which may be obtained at chambers, where the assignee and assignor concur); see [Rules of the Supreme Court, Ord. 46, R. R. 12 & 13.]

the trustee. The stop-order is the effective step, and whether previous enquiry was or not made at the Paymaster-General's or Registrar's offices, is immaterial (*e*).

28. **Case where there is no trustee.** — It may happen that at the time of the incumbrance there is *no representative* of the trust on whom notice can be served, as if A. be trustee of stock for B., and A. dies intestate, or his executor declines to act. In such a case it has been held, that an incumbrancer gains priority by taking all the precautions that under the circumstances are practicable, as if he serves a [notice in lieu of] *distringas* on the Bank where the stock is standing (*d*).

29. **Purchaser with notice.** — A purchaser who gives notice, or obtains a stop-order, can gain no priority over an incumbrance of which he *has notice himself*, at the time of his own purchase (*e*).

30. 36 & 37 Vict. c. 66, s. 25, sub-s. 6. — By 36 & 37 Vict. c. 66, s. 25, sub-s. 6, any *legal chose in action* may be assigned at law by writing under the hand of the \*as- [\*713] signor (not purporting to be by way of charge only) (*a*) upon express notice in writing being given to the legal holder of the *chose in action*, but subject to all the equities which would have been entitled to priority had the Act not passed. The notice of assignment of a policy of assurance which is required to be given by "The Policies of Assurance Act, 1867" (30 & 31 Vict. c. 144) to enable the assignee to sue, is not requisite to complete the title of the assignee as against a subsequent assignee; and accordingly a second incumbrancer who advanced his money with notice of a prior incumbrance, does not by giving the statutory notice gain priority over the prior incumbrancer who has neglected to give the notice."<sup>1</sup>

(*c*) See Warburton v. Hill, Kay, 478.

(*d*) Etty v. Bridges, 2 Y. & C. C. 486. [See as to the notice which has been substituted in the place of the writ of *distringas* Rules of the Supreme Court, Ord. 46, R. R. 2 *et seq.*; and *post*, Chap. xxxii, s. 1.]

(*e*) Warburton v. Hill, Kay, 470; *Re Holmes*, W. N. 1885, p. 6.]

[(*a*) As to the meaning of the words "not purporting to be by way of charge only," see *National Provincial Bank v. Harle*, 6 Q. B. D. 626; *Burlinson v. Hall*, 12 Q. B. D. 347.]

<sup>1</sup> *Newman v. Newman*, 28 Ch. D. 674.

*Fourthly.* Of the rule *Qui prior est tempore potior est jure*.

1. **General rule.** — “The rule,” observed V. C. Kindersley (b), “is sometimes expressed in this form:—‘As between persons having only equitable interests, *qui prior est tempore potior est jure*.’ This is an incorrect statement of it; for not only is it not universally true, as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it. Another form of stating the rule is this:—‘As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.’ But even this enunciation of the rule (when accurately considered) seems to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the word ‘equity’? For example, when we say that A. has a better equity than B., it means only that, according to those principles of right and justice, which a Court of equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which the Court of equity would altogether refuse to lend its assistance to either party as against the other. To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—‘As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity; or *qui prior est tempore potior est jure*.’” “Questions of priority between equitable incumbrancers,” said L. J. Turner, “are in general governed by the rule *qui prior est tempore potior est jure*. The rule, as I conceive, is founded on this principle, that the creation or declaration of a trust vests an estate in the person in whose favour the

(b) *Rice v. Rice*, 2 Drew. 77.

trust is created or declared. \* Where, therefore, it is [\*714] sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it" (a).

2. **All circumstances to be considered.** — For ascertaining priorities, the Court directs its attention to the nature and condition of the conflicting equitable interests, the circumstances and manner of their acquisition, and the whole conduct of the respective parties: in short, all the circumstances of the case (b). The following instances will suffice for illustration.

3. **Vendor's lien.** — A vendor has an equitable lien for his purchase-money; but if he deliver the deed of conveyance with a receipt for the purchase-money endorsed and signed, and the purchaser then makes an equitable mortgage of the property by deposit, the equity of the mortgagee, who was deceived by the deed, is better than that of the vendor, who was careless enough to sign the receipt without payment of the money (c). But if the mortgagee have notice of the lien, he of course cannot complain, and is bound by it (d).

4. **Possession of title deeds.** — The possession of the *title deeds* is a circumstance which may give the holder a better equity, provided they have come into his possession from want of due activity on the part of the prior incumbrancer, or through some neglect or default of such incumbrancer (e). But the

(a) *Cory v. Eyre*, 1 De G. J. & S. 167.

(b) *Rice v. Rice*, 2 Drew. 78, *per* V. C. Kindersley.

(c) *Rice v. Rice*, 2 Drew. 73; *West v. Jones*, 1 Sim. N. S. 205; *The Queen v. Shropshire Union Canal Company*, 8 L. R. Q. B. 420; [and see now 44 & 45 Vict. c. 41, s. 54].

(d) *Mackreth v. Symmons*, 15 Ves. 349.

(e) *Layard v. Maud*, 4 L. R. Eq. 397; see *Rice v. Rice*, 2 Drew. 80;

*Waldron v. Sloper*, 1 Drew. 200; *Perry-Herrick v. Attwood*, 25 Beav. 205, 2 De G. & J. 21; *Pease v. Jackson*, 3 L. R. Ch. App. 576; *Briggs v. Jones*, 10 L. R. Eq. 92; *Re Russell Road Purchase-moneys*, 12 L. R. Eq. 78; [*Clarke v. Palmer*, 21 Ch. D. 124; *Re Lambert's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234; *Lloyd's Banking Company v. Jones*, 29 Ch. D. 221;] and see *Ratcliffe v. Barnard*, 6 L. R. Ch. App. 652; [*Spencer v. Clarke*, 9 Ch. D. 137].



*onus* lies on the holder to establish a case of blamable conduct against the first incumbrancer (*f*); and the second incumbrancer gains no priority if the deeds get into his hands by an accident or by the misconduct of a stranger (*g*), or the wrongful act of the solicitor of the first incumbrancer (*h*), for it is not the doctrine of the Court that in the case of mere equitable interests priority can be obtained through the medium of a breach of trust or duty (*i*).

[\*715] \* [The whole question as to what conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee to a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage, has been fully discussed by the Court of Appeal (Cotton, Bowen and Frye, L. JJ.) in a recent case (*a*); in which the Court, after reviewing and classifying the earlier cases, arrived at the following conclusions: —

“(1). That the Court will postpone the prior legal estate to a subsequent equitable estate — (A), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in enquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot be otherwise explained; (B), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of

(*f*) *Allen v. Knight*, 5 Hare, 272, 11 Jur. 527; *Dixon v. Muckleston*, 8 L. R. Ch. App. 155.

(*g*) *Rice v. Rice*, 2 Drew. 83.

(*h*) *Cory v. Eyre*, 1 De G. J. & S. 149; [*Bradley v. Riches*, 9 Ch. D. 189].

(*i*) *Cory v. Eyre*, 1 De G. J. & S.

170; [and see *Harpham v. Shacklock*, 19 Ch. D. 207]. But see *The Queen v. Shropshire Union Canal Company*, 8 L. R. Q. B. 420; 7 L. R. H. L. 496; [*Bradley v. Riches*, 9 Ch. D. 189].

[(*a*) *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 482, 491].

any mere carelessness or want of prudence on the part of the legal owner" (b).]

[5. **Trustee improperly dealing with share certificates.**—If a trustee in whose name shares in a company are standing borrow money for his own purposes and deposit the 'certificates as a security for his debt, the equitable title of the mortgagee will not in the absence of negligence on the part of the *cestui que trust* prevail against the prior equitable title of the *cestui que trust* (c).

6. Where trust funds were invested in the names of two trustees in the shares of a bank, the articles of which provided that the bank should have a paramount charge on the shares held by more persons than one in respect of all monies owing to the bank from all or any of the holders thereof, alone or jointly with any other person, it was held that the bank had a lien on the shares for a debt owing by a firm in which one of the trustees was a partner, which must prevail over the title of the *cestuis que trust* (d).]

\* 7. **Secret equity.**—A party, having a secret [\*716] equity, who stands by and permits the apparent owner to deal with others, as if he were the absolute owner and as if there were no such secret equity, shall not be permitted to assert such secret equity against a title founded upon such apparent ownership (a). *A fortiori* if the person having the secret equity be party to a document which assumes that there is no such equity, or on having notice of a purchaser's claim do not give information of the equity, so as to enable him to proceed against the person by whom he has been deceived (b). ["It is a principle of natural equity

[(b) p. 494. The whole judgment deserves careful perusal. And see *Lloyd's Banking Company v. Jones*, 29 Ch. D. 221; *Manners v. Men*, 29 Ch. D. 725.]

[(c) *Shropshire Union Railways and Canal Company v. The Queen*, 7 L. R. H. L. 496.]

[(d) *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302. But see *Bradford Banking Company v. Briggs & Co.*, 29 Ch. D. 149; reversed on appeal, 31 Ch. Div. 19;

*Miles v. New Zealand Alford Estate Company*, 32 Ch. Div. 266.]

(a) *Mangles v. Dixon*, 1 Mac. & G. 446, per Lord Cottenham; S. C. 3 H. L. Cas. 739, per Lord Truro; *Troughton v. Gitley*, Ambl. (Blunt's ed.) 633, and cases cited, Ib. note (4); *Cornforth v. Pointon*, W. N. 1866, p. 189; [*Ex parte Bolland*, 9 Ch. D. 312; *Re Blachford*, W. N. 1884, p. 141.]

(b) *Mangles v. Dixon*, 1 Mac. & G. 447, 3 H. L. Cas. 740.

which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it" (c).]

8. **Canons laid down in Thornton v. Ramsden.**—The doctrines of the Court on this subject were much discussed in the case of Thornton v. Ramsden (d), and the following canons were laid down by the highest authorities in the House of Lords on appeal:—

a. If a stranger begins to build on land, *supposing it to be his own*, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not afterwards allow the real owner to assert his title to the land.

b. But if a stranger builds on land *knowing* it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it (e).

c. If a tenant builds on his landlord's land, he does [\*717] not, in the \*absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

d. If the tenant, being a mere tenant at will, builds on the land in the *belief* that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, *knowing* that he is acting in that belief, and

[(c) *Per Jud. Com. Ramcoomar Koondoo v. Macqueen*, L. R. Ind. App. Supp. vol. 40.]

(d) 4 Giff. 519; 1 L. R. H. L. 129, nom. Ramsden v. Dyson; and see Bankart v. Tennant, 10 L. R. Eq. 141;

[*Plimmer v. Mayor, &c. of Wellington*, 9 App. Cas. 699.]

(e) See also *Crampton v. Varna Railway Company*, 7 L. R. Ch. App. 562.

does not interfere to correct the error, (*semble*) equity will interfere to compel the grant of a lease.

*e.* If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the *knowledge* of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation (*a*).

[9. *Willmott v. Barber*.—The real ground upon which relief is given in these cases is fraud in the possessor of the legal right, and the elements necessary to constitute fraud of this description were enumerated by Fry, J., in a recent case (*b*), as follows:—

“(1). The plaintiff must have made a mistake as to his legal rights.

(2). The plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant’s land) on the faith of his mistaken belief.

(3). The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff.

(4). The defendant, the possessor of the legal right, must know of the plaintiff’s mistaken belief of his rights (*c*).

(5). The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right.”]

10. The question who has the better equity frequently arises where estates, subject to a common charge, become vested in different owners, and each assignee endeavours to throw the charge upon the other.

[(*a*) See *Plimmer v. Mayor, &c. of Wellington*, 9 App. Cas. 699.]

[(*b*) *Willmott v. Barber*, 15 Ch. D. 96, 105. And see *Weller v. Stone*, 54 L. J. N. S. Ch. 497.]

[(*c*) See as to this *Plimmer v. Mayor, &c. of Wellington*, 9 App. Cas. 699.]

[\*718] \*11. **Express agreement to exonerate from a judgment.** — It has been held in Ireland that if there be an *express agreement* that one estate shall exonerate another from a judgment, a purchaser with notice of the agreement will be bound by it (*a*). And a covenant that the one estate is *free from incumbrances* or for *quiet enjoyment* will amount to such an agreement (*b*).

12. **Judgments as between two purchasers.** — It has been further decided in Ireland that where A., the conusor of a judgment, settles an estate for valuable consideration, and afterwards sells an unsettled estate, the purchaser of the latter cannot have the judgment raised by a contribution from both estates (*c*); and even where a purchaser was not seeking relief against another purchaser, but the plaintiff was the judgment creditor seeking to have his debt raised, it was held that the whole onus must be borne by the subsequent purchaser (*d*); and the circumstance that the conveyance to the first purchaser contained a covenant against incumbrances or for quiet enjoyment does not appear, where it occurred, to have been the material ground on which the decision was rested (*e*). Neither did the Court distinguish the case where the subsequent purchaser had no notice of the prior charge. Indeed, in the leading case, the subsequent purchaser on whom the onus was thrown was apparently a purchaser without notice (*f*).

13. **As between settled and unsettled estates.** — It has been further ruled in Ireland that where the conusor of a judgment settles an estate with a covenant against incumbrances, the purchasers under the settlement can throw the judgments on the unsettled estates as against subsequent judgment

(*a*) *Hamilton v. Royse*, 2 Sch. & Lef. 315; *Handcock v. Handcock*, 1 Ir. Ch. Rep. 444.

(*b*) *Handcock v. Handcock*, 1 Ir. Ch. Rep. 444; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369; *Aicken v. Macklin*, 1 Dru. & Walsh. 621.

(*c*) *Hartley v. O'Flaherty*, Beat. 61; L.I. & G. t. Plunket, 208; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*d*) *Aicken v. Macklin*, 1 Dru. & Wal. 621.

(*e*) *Aicken v. Macklin*, 1 Dru. & Wal. 621; *Handcock v. Handcock*, 1 Ir. Ch. Rep. 444; and see *Hughes v. Williams*, 3 M. & G. 690; *Averall v. Wade*, L.I. & G. t. Sugden, 259.

(*f*) See *Hartley v. O'Flaherty*, Beat. 69.

creditors, who had merely a general and roving lien, and did not stand in the place of specific purchasers (*g*), and even where the settlement was voluntary and without a covenant against incumbrances, it was ruled by the M. R. in Ireland that the owners of other estates devised by the settlor had no equity for contribution from the settled estate to pay off a judgment to which both settled and unsettled estates were subject at the date of the settlement (*h*). But on appeal the decision was reversed (*i*).

\* [So where estates were expressed to be settled [\*719] for value, subject to charges amounting to 65,000*l.*, with a covenant against incumbrances except "the charges now existing thereon, amounting to the said sum of 65,000*l.*," and a power was reserved of further charging the property to a specific amount, which power was subsequently exercised, but the charges upon the estates at the time of the settlement in fact far exceeded 65,000*l.*, it was held that the purchasers under the settlement were entitled to be recouped the difference between the charges actually subsisting and the 65,000*l.*, in priority to the mortgagees under the power (*a*).]

14. **Law in England.** — These principles, which have been acted upon in Ireland, will no doubt be followed to some extent in England. If, for instance, A., possessing Blackacre and Whiteacre [which are subject to a common incumbrance,] mortgages Blackacre to B., and covenants that it is free from incumbrances, this is a contract between A. and B., and every purchaser of Whiteacre with notice of the incumbrance and of the contract must be bound by the contract.

15. **Rule in equity in absence of contract.** — But if there be no express contract between A. and B., then the right of B. depends on a rule of equity, and as against A. himself it is clear that B. can insist on throwing the whole incumbrance on Whiteacre (*b*); and so as against any person claiming a

(*g*) *Averall v. Wade*, L.L. & G. t. Sugden, 252; *Hughes v. Williams*, 3 Mac. & G. 683; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*h*) *Ker v. Ker*, 3 Ir. Rep. Eq. 480.

(*i*) 4 I. R. Eq. 15.

[(*a*) *Re Barker's Estate*, 3 L. R. Ir. 395.]

(*b*) See *Averall v. Wade*, L.L. & G. t. Sugden, 259.

general and roving lien only as a judgment creditor of A. (c); and even if A. afterward sell Whiteacre to C., who has notice of the incumbrance and of the mortgage, there is no ground for saying that B. has not the like equity as against C., but if C. have no notice of the incumbrance or no notice of the mortgage, the Court will probably refuse to enforce the rule against him. At least Lord St. Leonards seems to have thought that the decisions in Ireland do not affect innocent purchasers—*i.e.* purchasers for valuable consideration without notice (d). And in the case of *Strong v. Hawkes* (e), L. J. Turner expressed a doubt whether the cases in Ireland had not gone too far.

16. In *Barnes v. Racster* (f) a person mortgaged Foxhall to A., and then to B., and then Foxhall and No. 32 to A., and then Foxhall and No. 32 to C. All parties had notice of the prior transactions. It was held that B. could [\*720] not compel A. to pay himself \*exclusively out of No. 32, so as to leave B. the first incumbrancer on Foxhall, but C. was entitled to have the charges thrown proportionately upon Foxhall and No. 32.

17. **Purchaser with notice.**—A purchaser of an equitable interest *specifically* has a higher equity than a person claiming under a *general* and *roving* charge as a judgment, and therefore the purchaser of such an equitable interest without notice of an equitable judgment was properly held not to be bound by it (a).

[18. **Rule where specific charge on one property and general lien on another.**—If there be a specific charge on one property to secure a sum of money, and there be a general lien on other property, (as for instance a banker's lien on his customer's securities in his hands), to secure the same sum, the property comprised in the specific charge must be primarily

(c) See *Averall v. Wade*, L. & G. t. Sugden, 252.

(d) Vend. & P. 746, 14th ed.

(e) 4 De G. & J. 652, & MS.

(f) 1 Y. & C. C. C. 401; Bugden v. Bignold, 2 Y. & C. C. C. 377; and see *Re Lawder's Estate*, 11 Ir. Ch. Rep. 346; *In re Mower's Trust*, 8 L.

R. Eq. 110. As to the right of judgment creditors to marshal *inter se*, see *Re Lynch's Estate*, 1 Ir. Rep. Eq. 396.

(a) *Re Grady*, 13 Ir. Ch. Rep. 154. See *Wells v. Kilpin*, 18 L. R. Eq. 298.

resorted to in exoneration of the property subject to the general lien (b).

19. **Where goods wrongfully pledged by a firm.** — The owner of goods which have been wrongfully pledged by a partnership firm to secure an advance to them, which is further secured by the guarantee of one of the partners, or by the deposit of partnership property, is entitled to have the securities marshalled and to have the benefit of the guarantee or a lien on the deposited property (c).]

## SECTION II.

### OF TESTAMENTARY DISPOSITION.

1. **How trusts of freeholds to be devised.** — An equitable interest<sup>1</sup> in lands is transmissible by *devise* (d). Indeed the old *use*, which preceded the trust, was devisable by *parol* previously to the Statute of Wills, 32 H. 8, c. 15 (e); but after that Act the trust by analogy to legal estates, became devisable only by will in *writing*.

2. **Statute of Frauds.** — The Statute of Frauds, 29 Car. 2, c. 3, followed, which required a devise of "lands" to be by a will, *signed* by the testator in the presence of and attested by *three witnesses*. This enactment was applied by the Courts to a devise of the equitable interest in lands. Otherwise a door would have been opened to all the mischiefs and \*inconveniences the Statute was intended to pre- [\*721] vent (a). Whether trusts were within the *letter* of the Act, or equity brought them under its operation by

[(b) *Re Dunlop*, 21 Ch. D. 583.]

[(c) *Ex parte Salting*, 25 Ch. D. 148; *Ex parte Alston*, 4 L. R. Ch. App. 168.]

(d) *Cornbury v. Middleton*, 1 Ch. Ca. 211, *per Wyld, Just.*; *Greenhill v. Greenhill*, 2 Vern. 679, *per Lord Hardcourt*; *Philips v. Brydges*, 3 Ves. 127.

(e) *Shepp. Touch.* 407; and see *ante*, p. 611, note (1).

(a) *Wagstaff v. Wagstaff*, 2 P. W. 259, *per Lord Macclesfield*; *Adlington v. Cann*, 3 Atk. 151, *per Lord Hardwicke*; *Burgess v. Wheate*, 1 Eden, 224, *per Lord Mansfield*.

<sup>1</sup> Equitable are governed by the same rules as legal estates; *Cushing v. Blake*, 30 N. J. Eq. 689; *Noble v. Andrews*, 37 Conn. 346.



*analogy*, it is not easy to determine (*b*); but undoubtedly the word "lands" has often been extended to include trusts (*c*), and, if so, there seems to be little reason why trusts should not have fallen within the *express* terms of the Statute.

3. **Trusts of copyhold.**—*Copyholds*, strictly speaking, are not at common law a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender itself (*d*). Thus copyholds at *law* were out of the Statute of Frauds, and might have been devised by a will neither signed nor attested; and as equity followed the law the trust of a copyhold was devisable in the same manner (*e*). And the equitable interest might always have been passed by will, though not preceded by a *surrender*, which previously to 55 G. 3, c. 192, was required to pass the *legal* estate (*f*).

4. **Where no custom to devise the legal estate of copyholds.**—As equitable interests in copyholds were regulated by analogy to the custom affecting the legal estate, one might have supposed, that where the *legal* estate could not be devised, the *equitable* estate in like manner must have been left to descend. However, it was decided by the Court, that even assuming the absence of any power to devise the *legal* estate (*g*), the owner of the equitable estate could pass it by *will* (*h*). Whether the will must have been executed according to the Statute of Frauds, or whether any instrument

(*b*) See *Burgess v. Wheate*, Wagstaff v. Wagstaff, *ubi supra*; *Doe v. Danvers*, 7 East, 322.

(*c*) See *supra*, p. 681.

(*d*) *Hussey v. Grills*, Amb. 800, *per* Lord Hardwicke.

(*e*) *Appleyard v. Wood*, Sel. Ch. Ca. 42; *Wagstaff v. Wagstaff*, 2 P. W. 268; *Tuffnell v. Page*, 2 Atk. 37; and see *Attorney-General v. Andrews*, 1 Ves. 225; but see *Anon. case*, cited *Wagstaff v. Wagstaff*, 2 P. W. 261.

(*f*) *Greenhill v. Greenhill*, 2 Vern. 679; *Tuffnell v. Page*, 2 Atk. 37; *Gibson v. Rogers*, Amb. 93.

(*g*) As to the validity of a custom restraining surrenders to the use of a will, see *Pike v. White*, 3 B. C. C. 286, and note 1, *ib.*; *Doe v. Thompson*, 7 Q. B. 897.

(*h*) *Lewis v. Lane*, 2 M. & K. 449; *Wilson v. Dent*, 3 Sim. 385; [*Allen v. Bewsey*, 7 Ch. D. 453;] but see *Hussey v. Grills*, Amb. 299.

sufficient for declaring the uses on a surrender would have been enough, does not sufficiently appear.

**Of customary freeholds.** — But in a case of customary freeholds of which the legal estate could not be devised (and customary freeholds are now regarded as copyholds (i)), Lord Hardwicke held that the reason why the *equitable* interest in \*copyholds could be devised by an [\*722] unattested will, was because the *legal* estate of copyholds *could be devised* by an unattested will, and that as, in the case of customary freeholds before him, the legal estate could not be devised, the equitable interest could only pass by a will executed according to the *Statute of Frauds* (a). And *à fortiori* where a customary freehold, of which the legal estate was not devisable, was vested in a trustee upon such trusts as the *cestui que trust* should by will “to be by him *legally* executed” appoint, it was held that the equitable interest could not be devised by a will not executed according to the Statute of Frauds (b).

5. **Late Wills Act.** — By the late Wills Act (c), as to wills made on or after 1st January, 1838, property, of whatever description, whether *real or personal*, freehold or copyhold, legal or equitable, may be devised or bequeathed by a will in writing, signed by the testator in the presence of and attested by *two* witnesses, and by such a will only.

6. **Revocation of wills by alteration of estate.** — If, before this Act, a testator seised of an equitable estate in fee had devised it, and then disturbed the *equitable seisin* by executing a conveyance and taking back a new estate in the same property, the will was revoked in like manner as if the estate had been legal (d). But if a testator had devised an equitable estate and afterwards taken a conveyance so as merely

(i) See *ante*, p. 248.

(a) *Hussey v. Grills*, Amb. 300. The whole argument in this case assumes that the will as opposed to the codicil was executed according to the Statute of Frauds, and yet the report states that the will was in writing, “but not attested according to the Statute of Frauds.” The Reg. Lib.

does not state whether the will was or not so executed. Amb. Blunt’s edit.

(b) *Willan v. Lancaster*, 3 Russ. 108.

(c) 1 Vict. c. 26.

(d) *Lock v. Foote*, 5 Sim. 618; *Earl of Lincoln’s case*, 1 Eq. Ca. Ab. 411; *S. C. Shower’s P. C.* 154.

to clothe the equitable estate with the legal, or was party to a conveyance for merely changing the trustees, such conveyances were not a revocation of the prior will (*e*). Now by the late Wills Act, a subsequent disturbance of the seisin, either at law or in equity, does not revoke the will (*f*).

[\*723]

## \* SECTION III.

## OF SEISIN AND DISSEISIN.

1. **Equitable seisin.** — The term *seisin* is properly applicable to *legal* estates; but a Court of equity regards actual receipt of the rents and profits under the *equitable* title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Thus, in *Casborne v. Scarfe* (*a*), it was disputed, whether, as curtesy did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said, "It is objected there is no *seisin* whatever of the legal estate in the wife, in the consideration of law. But the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this Court is considered equivalent to an actual *seisin* of a freehold estate at common law; and I am of opinion there was: actual possession, clothed with the receipt of the rents and profits, is the highest instance of an *equitable seisin*, both of which were in this case."

2. **Possessio fratris.** — And so it was held that there was *possessio fratris* of a trust, in other words, that if a person inherited a trust and died before actual *seisin* of the estate by receipt of the rents and profits, it should descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but that if there had been such a receipt of the rents and profits as constituted equita-

(*e*) *Doe v. Pott*, 2 Doug. 710; (*f*) 1 Vict. c. 26, s. 23.  
*Watts v. Fullarton*, cited Doug. 718; (*a*) 1 Atk. 603; and see *Parker v. Parsons v. Freeman*, 3 Atk. 741; Carter, 4 Hare, 413.  
*Dingwell v. Askew*, 1 Cox, 427;  
*Clough v. Clough*, 3 M. & K. 296.

ble *seisin*, the sister of the whole blood, as heir to the brother, would exclude the brother of the half blood (*b*).

3. **Marquis of Cholmondeley v. Lord Clinton.**—The doctrines of the Court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well-known case of the Marquis of Cholmondeley v. Lord Clinton (*c*). The circumstances were briefly these:—George, Earl of Orford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body, remainder as he should by deed or will appoint, remainder to the *right heirs of Samuel Rolle*, with a power reserved of revocation and new appointment. Some time after, the Earl executed a mortgage in fee, which  
\*operated in equity as a revocation of the settle- [\*724]  
ment *pro tanto*. In 1791 the Earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the Earl himself, as the *heir of Samuel Rolle at the date of the deed*), should have descended to the right heir of the Earl, but, the parties mistaking the law, the person who was *heir of Samuel Rolle at the death of the Earl* was allowed to enter on the premises, and continued in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the Earl against the mortgagee and the assign of the right heir of Samuel Rolle, for redemption of the premises, and an account of the profits. It was debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of the Earl's heir, to whom the equity of redemption belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*—first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it; and, secondly, because a tortious act could never be the foundation of an equitable

(b) See now 3 & 4 W. 4, c. 106.

(c) 2 Mer. 171; 2 J. & W. 1; and see Penny v. Allen, 7 De G. M. & G. 422.

title; that an equitable title might undoubtedly be *barred* by length of time but could not be *shifted* or *transferred* (a); that the equity of redemption subsisted, and it must therefore belong to some one, and could only belong to the original *cestui que trust* (b); that the *cestuis que trust* could only be barred by barring the trustee (c). Sir W. Grant did not then decide the point, but directed a case for the opinion of the Queen's Bench on a question of law, and retained the bill in the meantime.

**Reheard.** — The cause was afterwards reheard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been *disseised* and was consequently barred (d). "The grounds," he said, "upon which it is contended that the holder of the rightful equity is not bound by *laches* and non-claim are that the tortious possessor does not claim to be the holder of more than the equitable estate — that there is no *disseisin* abatement or intrusion of a trust — that the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal [\*725] estate, and he has \*therefore only a precarious and permissive possession — that tortious possession can never be the foundation of an equitable title (a). But this reasoning," he continued, "proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff's right to the remedy, not the defendant's title to the estate. A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time (b). As to the argument that a title in a Court of equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. If the negligent owner has forever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. The plaintiff is barred of his remedy;

(a) See *Hopkins v. Hopkins*, 1. Atk. 590.

(b) 2 Mer. 357-359.

(c) *Ib.* 361.

(d) 2 J. & W. 1.

(a) 2 J. & W. 153.

(b) *Ib.* 155.

the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity (c). If the mere existence of an old legal estate would have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail; quiet enjoyment for sixty, one hundred, or two hundred years or more, would be no security, if the old term had existed longer; it would always be open to enquiry in whom was vested the equitable title which originally existed when the old term was created" (d).

**Appeal to the House of Lords.**—On appeal to the House of Lords his Honour's decision was affirmed, and the principle on which it proceeded was approved. Lord Eldon said, "He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and *worked the same effect as abatement or intrusion with respect to legal estates, and that for the quiet and peace of titles and the world it ought to have the same effect*" (e).

## \*SECTION IV.

[\*726]

OF MERGER.<sup>1</sup>

**1. General view.**—At law merger is the necessary consequence of the union of two estates in the same person in the

(c) Ib. 155, 156.

(e) Ib. 190, 191.

(d) 2 J. &amp; W. 157.

<sup>1</sup> *Merger.* Where the legal estate and equitable estate come into possession of the same person, the equitable becomes merged in the legal estate; *Hopkinson v. Dumas*, 42 N. H. 306; *Healey v. Alston*, 25 Miss. 190; *Gardner v.*

same right, but in equity two estates without any intervening interest may meet in the same person in the same right without merger, and, on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Court is guided is the *intention*; and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested* (a).

2. **Purchase subject to charges.**—The chief importance of the doctrine of merger is with reference to charges. Thus A., the owner of an estate subject to a first incumbrance in favour of B. and a second incumbrance in favour of C., contracts to sell the estate to D. Here, if the purchaser knows of both the incumbrances, he of course will not accept the title until they have been discharged. But should he have *actual* notice of the incumbrance to B. only, and take a conveyance from A. and B., so as to extinguish the charge of the latter, this act (if, by reason of his having constructive notice of C.'s incumbrance or otherwise, the defence of purchase for value without notice is not available) lets in the incumbrance of C. as the first charge (b). If,

(a) Lord Compton v. Oxenden, 2 Ves. jun. 264; Forbes v. Moffatt, 18 Ves. 390; Horton v. Smith, 4 K. & J. 630.

(b) Toulmin v. Steere, 3 Mer. 210; Medley v. Horton, 14 Sim. 226; Parry v. Wright, 1 S. & S. 369, 5 Russ. 142;

Smith v. Phillips, 1 Keen, 694; Brown v. Stead, 5 Sim. 535; Mocatta v. Murgatroyd, 1 P. W. 393. [The case of Toulmin v. Steere, *ubi sup.* has been doubted, and in the recent case of Adams v. Angell, 5 Ch. D. 634, 645, the late M. R., sitting in the Court of

Astor, 3 Johns. Ch. 53; James v. Johnson, 6 Johns. Ch. 417. The equitable will not merge in the legal estate unless the latter is larger or commensurate with the former, nor will an equitable fee merge in anything less than a legal fee; Donalds v. Plumb, 8 Conn. 453; Hunt v. Hunt, 14 Pick. 374. A merger may be prevented by the intention of the parties; Starr v. Ellis, 6 Johns. Ch. 393; James v. Morey, 2 Cow. 246; Gardner v. Astor, 3 Johns. Ch. 53. As between husband and wife, if one hold the legal and the other the equitable estate there will be no merger; Clark v. Tennyson, 33 Md. 85. Mere possession is no indication or evidence of merger; Brasswell v. Downs, 11 Fla. 62. In some cases there is a presumption of a delivery or conveyance to the *cestui que trust* which would bring about a merger; Church v. Mott, 7 Paige, 77; Sinclair v. Jackson, 8 Cow. 543; Jackson v. Moore, 13 Johns. 513. If a life tenant remove an incumbrance from an estate, it is presumed that it was not intended to remove, but merely to transfer the incumbrance; State v. Koch, 47 Mo. 582.

\* on the other hand, the purchaser, being apprehensive of some outstanding incumbrance, take an assignment of B.'s security to a trustee for him in order that it may be kept on foot, then the charge does not merge in the fee-simple; but should C. take proceedings for raising his charge, the purchaser may protect himself by the shield of B.'s incumbrance as the first charge (a).

3. **Purchase by person entitled to the charge.**—The same principle under different circumstances applies where B., the first incumbrancer, buys up the interest of the owner subject to the charge; for if the charge be not kept on foot the incumbrance of C. will be let in, unless the defence of purchase for value without notice be applicable (b).

4. **Purchaser may require the charge to be kept on foot.**—The vendor must not be put to extra expense by the form in which the purchaser wishes the conveyance to be made, and where the vendor is under a personal liability he may insist on being discharged from it, but with these qualifications the purchaser can insist on having charges kept up instead of being merged (c).

5. **Mode of keeping charge on foot.**—If the purchaser desire to keep on foot a charge vested in himself, he should take a conveyance of the equity of redemption to a trustee,

Appeal, while withholding his opinion as to whether it was binding in that Court, observed, "it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrancers so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." And in a recent Indian appeal the Privy Council refused to apply the

doctrine of *Toulmin v. Steere* to India on the ground that it did not rest on any broad intelligible principle of justice; *Gokuldoss Gopaldoss v. Ram-bux Seochand*, 11 L. R. Ind. App. 126.] As to *Greswold v. Marsham*, 2 Ch. Ca. 170, see Dart. 917, 918, 5th edit. [*Gokuldoss Gopaldoss v. Ram-bux Seochand*, 11 L. R. Ind. App. 126, 130.] See also *Anderson v. Pignet*, 8 L. R. Ch. App. 180.

(a) *Watts v. Symes*, 16 Sim. 646, per V.C. Shadwell; *Smith v. Phillips*, 1 Keen, 699, per Lord Langdale; *Parry v. Wright*, 1 S. & S. 379, per Sir John Leach.

(b) *Parry v. Wright*, 1 S. & S. 369; 5 Russ. 142; *Garnett v. Armstrong*, 2 Conn. & Laws. 458.

(c) *Cooper v. Cartwright*, Johns. 679.



and the intention should be expressed on the face of the instrument, and if this be done the charge and the inheritance will both be sustained in equity so as to afford protection against any intervening incumbrance (*d*).

6. **Merger on a contingency.** — A purchaser may even have the charge assigned so as to keep it on foot in one event, and merge it in another event, should the contingencies affecting the estate make such a course desirable (*e*).

7. **A trustee not absolutely necessary.** — The assignment should in prudence be made to a trustee, but if the purchaser have the equity of redemption conveyed to *himself*, yet if the intention to keep up the charge be clear, no merger will take place (*f*).

8. **Getting in a charge pending contract for purchase.** — If a person *contract* only for the purchase of an estate, and pays off a first charge with a view to the purchase but before the completion of it, no merger takes place, but the purchaser stands in the shoes of the first incumbrancer (*g*).

**Where the person who created the second charge buys up the first charge.** — The question of merger has been spoken of as one of *intention*, but this principle must not be applied [\*728] where a person has \*himself created two successive incumbrances and then buys up the first charge, for in this case the mortgagor when he creates the second incumbrance is under a duty to discharge the debt previously incurred, and though the second mortgagee cannot compel him to do this, yet if the mortgagor do discharge the first debt, the second incumbrancer, whatever may have been the intention, will have the benefit of it. Besides, in most cases a mortgagor, in creating an incumbrance, enters into a covenant for further assurance, and this, independently of any general equity, would, it is conceived, give the incumbrancer a right to call for the assignment to him of any interest in the estate subsequently acquired by the mortgagor. Although,

(*d*) *Bailey v. Richardson*, 9 Hare, 736; and see *Holt v. Holt*, cited 1 P. W. 374.

(*e*) See *Selsey v. Lake*, 1 Beav. 146, 148.

(*f*) See *Davis v. Barrett*, 14 Beav.

542; *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 688; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*g*) *Watts v. Symes*, 1 De G. M. & G. 240.

therefore, the mortgagor take an assignment of the prior charge to a trustee for himself to the intent that the same may be kept on foot, yet equity will not allow this as against the second incumbrancer (*a*).

10. *Otter v. Vaux*. — This has been carried so far that where a mortgage was made with a power of sale, and then a second incumbrance was created, and then the mortgagor purchased under the power of sale in the first mortgage, it was held that by this means the second incumbrance was let in as the first charge upon the estate (*b*). It was clear that if the mortgagor had paid off the first mortgage and taken a re-conveyance, this would have enured to the benefit of the second mortgagee; and the substance of the transaction was thought to be the same where the mortgagor took a re-conveyance from the mortgagee by the machinery of the power of sale: it was said that this gave the second incumbrancer a double security — first, the purchase money in the hands of the first mortgagee, and then the estate in the hands of the mortgagor; but the answer was that the mortgagee could get no more than he was entitled to, viz., his principal money and interest (*c*).

[11. *Trustee in bankruptcy buying up charge*. — But where the trustee in bankruptcy of the mortgagor purchased from the first mortgagee, it was held that the second mortgagee was unaffected by the transaction, that the trustee stood in the position of transferee of the mortgage, and the second mortgagee was entitled to redeem him upon the usual terms (*d*).]

12. *Owner of a charge may buy equity of redemption and hold his charge against an intervening incumbrancer*. — It was observed by Sir William Grant (*e*) that the cases of *Greswold v. Marsham* (*f*) and *Mocatta v. Murgatroyd* (*g*) were express authorities to show that one purchasing an equity of \*redemption could not set up a prior mortgage of [\*729]

(*a*) *Otter v. Lord Vaux*, 2 K. & J. 657, per V.C. Wood.

(*b*) *Otter v. Lord Vaux*, 2 K. & J. 650.

(*c*) *Otter v. Lord Vaux*, 2 K. & J. 657.

[(*d*) *Bell v. Sunderland Building Society*, 24 Ch. D. 618.]

(*e*) *Toulmin v. Steere*, 3 Mer. 224.

(*f*) 2 Ch. Ca. 170.

(*g*) 1 P. W. 393.

his own, nor consequently a mortgage which he had got in, against subsequent incumbrances of which he had notice. Now a person who borrows money cannot be his own creditor, or set up an incumbrance of his own, as against his own creditor (*a*); and if the vendor of the equity of redemption be himself personally liable for the charge, the purchaser will, as a general rule, be bound to indemnify him, but that one purchasing an equity of redemption cannot set up a mortgage of his own, or one which he has got in, as against incumbrances not created by himself (a proposition not established by the authorities cited by Sir W. Grant (*b*)) is, it is conceived, not law at the present day (*c*). If the first mortgage be paid off and extinguished, of course the second charge is let in; but, subject to the equities flowing from the contract between the purchaser and his vendor, the first mortgage and the equity of redemption may be so vested in the same person as to keep the two separate, and so exclude the second incumbrance.

13. **Effect of keeping a charge on foot.**—It must be borne in mind that where the charge and the inheritance do not merge, the person in whom they are vested has two distinct possessions, and in the absence of any indication of intention that the charge shall in equity wait upon and attend the inheritance, the charge will go to the executor, subject to probate and legacy duty (*d*), and the inheritance to the heir (*e*). The question, therefore, is constantly arising as between the real and personal representatives, whether the two interests merged in the lifetime of the person entitled to

(*a*) *Watts v. Symes*, 1 De G. M. & G. 244, *per* L. J. Knight Bruce.

(*b*) See *Watts v. Symes*, 1 De G. M. & G. 244; and *Dart V. & P.* 917, 918, 5th edit.; [*Adams v. Angell*, 5 Ch. D. 634.]

(*c*) See now *Hayden v. Kirkpatrick*, 34 Beav. 645; *Stevens v. Mid-Hants Railway Company*, 8 L. R. Ch. App. 1064; [*Gokuldoss Gopaldoss v. Ram-bux Seochand*, 11 L. R. Ind. App. 126.]

(*d*) See *Swabey v. Swabey*, 15 Sim. 502.

(*e*) *Belaney v. Belaney*, 2 L. R. Ch. App. 138; 35 Beav. 469. Lord Romilly, M.R., observed that "If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir." Is it meant by this that a charge cannot be kept up for the benefit of the next of kin, but only for the benefit of persons claiming under a will?

both or were subsisting at the time of his death; and the question of merger or non-merger is held to be an open one up to the death of a testator (*f*), and for the purpose of collecting the intention parol evidence is admissible (*g*).

**14. Rule where charge and inheritance become united.**—

Where a person is entitled to a charge and to the \*inheritance under the same instrument (*a*), *or* being [\*730] first entitled to the charge subsequently acquires the inheritance as devisee (*b*), or heir (*c*), *or* being first entitled to the inheritance acquires the charge by bequest (*d*), or by succession as next of kin (*e*), in all these cases, in the absence of anything said or done by the owner of the charge and of the estate to show what his intention was (*f*), the Court presumes the charge to be merged or not according as merger would or not be for the owner's benefit. If, therefore, the owner would, as in the case of an infant previously to the late Wills Act, have had a larger testamentary power over the charge than over the inheritance (*g*), or if the merger would let in subsequent or competing incumbrances (*h*) of substantial amount (*i*), or the debts of the testator or

(*f*) *Swinfen v. Swinfen* (No. 3), 29 Beav. 199; and see *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244.

(*g*) *Astley v. Milles*, 1 Sim. 298.

(*a*) *Grice v. Shaw*, 10 Hare, 76; *Richards v. Richards*, Johns. 754.

(*b*) *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 688; *Davis v. Barrett*, 14 Beav. 642.

(*c*) *Chester v. Willes*, Amb. 246; *Powell v. Morgan*, 2 Vern. 90; *Thomas v. Kemeys*, 2 Vern. 348.

(*d*) *Price v. Gibson*, 2 Eden, 115.

(*e*) *Donisthorpe v. Porter*, 2 Eden, 162; *Lord Compton v. Oxenden*, 2 Ves. jun. 260.

(*f*) See *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244, in which case Sir John Romilly, M.R., observed, "The three tests usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance at the time

when he became entitled to the absolute interest in the charges are: 1. Any actual expression of that intention; 2. where the form and character of the acts done are only consistent with the keeping the charge on foot; and 3. such an intention may be presumed when, though a total silence in all other respects pervades the matter, it appears that it was for the interest of the owner of the charge that it should not merge in the inheritance."

(*g*) *Powell v. Morgan*, 2 Vern. 90; *Thomas v. Kemeys*, 2 Ib. 345; *Duke of Chandos v. Talbot*, 2 P. W. 601.

(*h*) *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 688; *Grice v. Shaw*, 10 Hare, 76; *Richards v. Richards*, Johns. 754; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*i*) *Richards v. Richards*, Johns. 767.

grantor (*j*), the Court presumes the intention to have been that the charge and the inheritance, though both vested in the same person, should be kept distinct. But if it clearly appear that to keep the charge on foot could in no way benefit the owner it will merge (*k*).

15. **Rule where owner pays off a charge.**—Where a charge is *paid off* by a person owning an interest in the property charged, the *quantum* of interest which he owns is, in the absence of direct evidence of intention, the chief guide in determining whether merger takes place. If he be *absolutely* entitled, the *presumption* is that he meant to free the property from the charge; if only *partially* interested, the *presumption* is that he intended to keep it on foot.

16. **Tenant in fee-simple paying off a charge.**—Thus, [\*731] if the person paying off the charge be *tenant in \*fee-simple*, the presumption will be that the charge was meant to be merged (*a*), unless the assignment of the charge was to a trustee in trust for the owner of the inheritance, his “*executors, administrators and assigns*,” instead of his “*heirs and assigns*” (*b*), or there were other circumstances in the transaction sufficient to exclude the presumption (*c*).

The mere fact of taking the assignment to a *trustee* for the person paying off, though a material ingredient in the question of intention, is not alone enough to keep the charge on foot (*d*).

[And where a person, claiming to be the absolute owner of an estate, borrows money to pay off a mortgage, there being no intermediate incumbrance, the presumption is that he means to extinguish the charge (*e*).]

(*j*) *Davis v. Barrett*, 14 Beav. 552;  
*Sing v. Leslie*, 2 H. & M. 68.

(*k*) *Price v. Gibson*, 2 Eden, 115;  
*Donisthorpe v. Porter*, 1b. 162; Lord  
*Compton v. Oxenden*, 2 Ves. jun. 263;  
*Swinfen v. Swinfen* (No. 3), 29 Beav.  
199.

(*a*) *Hood v. Phillips*, 3 Beav. 513;  
*Pitt v. Pitt*, 22 Beav. 294; *Gunter v.*  
*Gunter*, 23 Beav. 571; *Swinfen v.*  
*Swinfen* (No. 3), 29 Beav. 199.

(*b*) *Gunter v. Gunter*, 23 Beav. 571;  
and see *Tyrwhitt v. Tyrwhitt*, 32  
Beav. 244.

(*c*) *Keogh v. Keogh*, 8 I. R. Eq.  
179.

(*d*) *Pitt v. Pitt*, 22 Beav. 294;  
*Hood v. Phillips*, 3 Beav. 513.

[(*e*) *Mohesh Lal v. Mohunt Bawan*  
*Das*, 10 L. R. Ind. App. 62.]

17. **Tenant for life paying off a charge.** — If the person paying off the charge be *tenant for life*, the Court considers that as his interest ceases with his death, he could never have meant that the charge should be extinguished instead of enuring to the benefit of his representatives (*f*); and the same rule applies though the tenant for life be or become entitled (subject to remainders to his own issue which fail) to the ultimate reversion in fee (*g*). But even in the case of tenant for life, positive evidence may be given by parol that he meant to merge the charge (*h*).

18. **Tenant in tail in possession and of age paying off a charge.** — As *tenant in tail in possession*, if of age, has an absolute power of disposition over the estate, subject to his compliance with certain forms, the presumption is, that if he pay off a charge he meant to merge it (*i*).

19. **Special cases where charge has been kept on foot.** — But if *tenant in fee-simple*, subject to an *executory limitation* over, which he cannot destroy (*j*), or a *tenant in tail* under an *Act of Parliament*, who is incapable of acquiring the fee-simple (*k*), or *tenant in tail in remainder* during the existence of the tenant for \* life whose issue, if any, will be prior [\*732] tenants in tail (*a*), pay off a charge, in all these cases, as the interest of the party required the charge to be kept on foot, the presumption is that such was the intention. And where a tenant in tail paid off a charge with the intention of extinguishing it *believing* himself to be tenant in fee-simple, and assuming that as the basis of the transaction, the Court considered, on the ground of *mistake*, that the tenant in tail had not merged the charge (*b*).

(*f*) *Pitt v. Pitt*, 22 Beav. 294; *Burrell v. Earl of Egremont*, 7 Beav. 205; *Redington v. Redington*, 1 B. & B. 131; *Faulkner v. Daniel*, 3 Hare, 217; *Lindsay v. Earl Wicklow*, 7 I. R. Eq. 192.

(*g*) *Wyndham v. Earl of Egremont*, Amb. 753; *Trevor v. Trevor*, 2 M. & K. 675.

(*h*) *Astley v. Milles*, 1 Sim. 298.

(*i*) *St. Paul v. Dudley*, 15 Ves. 173, *per* Lord Eldon; *Jones v. Morgan*, 1 B. C. C. 206; *Earl of Bucking-*

*hamshire v. Hobart*, 3 Sw. 199; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*j*) *Drinkwater v. Combe*, 2 S. & S. 340.

(*k*) *Shrewsbury v. Shrewsbury*, 3 B. C. C. 120; S. C. 1 Ves. jun. 227; see *Earl of Buckinghamshire v. Hobart*, 3 Sw. 200.

(*a*) *Wigsell v. Wigsell*, 2 S. & S. 364; *Horton v. Smith*, 4 K. & J. 624.

(*b*) *Earl of Buckinghamshire v. Hobart*, 3 Sw. 186; *Kirkham v. Smith*, 1 Ves. 258.

20. **Payment of charge and subsequent acquisition of fee.**— It seems to be settled that where a tenant for life or tenant in tail in remainder pays off a charge, and *afterwards the fee devolves* on the tenant for life, or the *remainder* of the tenant in tail *vests in possession*, this subsequent union of the charge and the inheritance is not *per se* sufficient to rebut the intention previously shown to keep the charge on foot (*c*).

21. **Mortgage by person who has bought up a charge.**— If a person having both a subsisting charge and the estate mortgage or convey the latter, without mention of the charge, the security carries with it all the mortgagor's interest, and as between the mortgagor and mortgagee there is a merger (*d*). If tenant in fee of an estate mortgage it to the trustees of his settlement to secure a fund to which he is absolutely entitled, subject to a life interest limited to his wife, and then dies in the lifetime of the wife there can be no merger, for during the existence of the wife's interest the trustees could not, without a breach of trust, release the charge to him (*e*).

22. **Whether charges can be made to attend the inheritance.**— As charges are not unfrequently assigned like terms of years upon trust to *attend the inheritance*, it may be useful to add some cautionary remarks. So far as the author is aware, there is no authority for saying that charges can be made to wait upon the inheritance like terms of years. No doubt charges, like heirlooms and other personalty, can be settled to a certain extent to run in the channel of realty, but can they be impressed with the nature of realty itself? Thus A. buys an estate, and settles it by the purchase deed to the use of himself for life, with remainder to his first and other sons in tail, with remainder over to B., and suspecting secret incumbrances has a charge assigned to a trustee upon trust to attend the inheritance; A. dies, leaving an only son, who shortly afterwards dies without issue, when the estate be-  
[\*733] comes \*vested in B. An incumbrancer now starts up, and the charge is raised. Who is to have the

(c) Trevor v. Trevor, 2 M. & K. 675; Wigsell v. Wigsell, 2 S. & S. 364; Horton v. Smith, 4 K. & J. 624.  
(d) Tyler v. Lake, 4 Sim. 351;  
Johnson v. Webster, 4 De G. M. & G. 474.  
(e) Wilkes v. Collin, 8 L. R. Eq. 338.

benefit of it? Not, it will be said, A.'s real or personal representative, for by the trust he has parted with the absolute interest in favour of others. Not B., for how can personal estate go after an entail to a remainderman. The practice of assignment of charges, however, is so prevalent that when the point comes to be decided, the Court *may* go the whole length of holding that charges can attend the devolution of real estate through all its changes, and that they are not barred, &c., and that though latent before, yet they resume their vitality when a secret incumbrance is disclosed. The point must at present be considered an open one.

23. 36 & 37 Vict. c. 66, s. 25. — Now by a recent Act, 36 & 37 Vict. c. 66, s. 25, sub-s. 4, there is not any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

## SECTION V.

### OF DOWER AND CURTESY.<sup>1</sup>

1. **Dower and curtesy of a trust.** — A trust or equitable interest (*a*) and equity of redemption (*b*), of *freeholds*, were until the late Act (*c*) exempt from the *lien* of dower; but

- (*a*) *Colt v. Colt*, 1 Ch. Rep. 254; *Bottomley v. Lord Fairfax*, Pr. Ch. 336; *Attorney-General v. Scott*, Cas. t. Talb. 138; *Chaplin v. Chaplin*, 3 P. W. 229; *Shepherd v. Shepherd*, Id. 234, note (D); *Lady Radnor v. Rotherham*, Pr. Ch. 65, *per* Lord Somers; *Godwin v. Winsmore*, 2 Atk. 525. The distinction taken by Sir Jos. Jekyll in *Banks v. Sutton*, 2 P. W. 700, between trusts created by the husband himself, and trusts originating from a stranger, has been overruled by subsequent cases; see *Curtis v. Curtis*, 2 B. C. C. 630; *D'Arcy v. Blake*, 2 Sch. & Lef. 391; *Burgess v. Wheate*, 1 Eden, 197.
- (*b*) *Dixon v. Saville*, 1 B. C. C. 326; *Reynolds v. Messing*, cited 1 Atk. 604; *Casborne v. Scarfe*, 2 J. & W. 194.
- (*c*) 3 & 4 W. 4, c. 105.

<sup>1</sup> In most of the states dower will attach to an equitable estate; *Lewis v. James*, 8 Humph. 537; *Gully v. Ray*, 18 Ky. 113; *Bowers v. Keesecker*, 14 Ia. 301; *Miller v. Stump*, 3 Gill, 304; *Lawson v. Morton*, 6 Dana, 471; the contrary is true in Massachusetts and Maine; *Lobdell v. Hayes*, 4 Allen, 187; *Reed v. Whitney*, 7 Gray, 533; *Hamlin v. Hamlin*, 19 Me. 141. Curtesy also attaches to an equitable estate in most of the states; *Gardner v. Hooper*, 3 Gray, 404; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Cushing v. Blake*, 30 N. J. Eq. 689; but not unless the estate was actually in the possession of the wife; *Sentill v. Robeson*, 2 Jones Eq. 510.



were subject to the curtesy of the husband (*d*), unless the husband was an alien (*e*).

2. **Freebench.** — An equitable interest in *copyholds* (as the late Act does not apply to them (*f*)) remains as before not subject to freebench (*g*).

3. **What seisin required to give curtesy.** — With respect to *curtesy*, as at *law* the wife, to entitle her \* husband to curtesy, must have *seisin* in deed of the freehold (*a*), the question arises whether in the instance of a *trust*, there must not be such a *seisin* of the equitable estate in the wife as is considered equivalent to legal *seisin*, as actual possession of the estate clothed with the receipt of the rents and profits.

4. **No curtesy where there is adverse possession.** — It seems to be admitted that if the equitable interest be in the possession of a stranger, *adversely to the right of the wife*, there is no such seisin in deed as to entitle the husband to his curtesy (*b*).

5. **Executory trusts.** — But if money be articulated or directed by will to be laid out in a purchase of *land to be settled on a*

(*d*) *Chaplin v. Chaplin*, 3 P. W. 234, *per* Lord Talbot; *Attorney-General v. Scott*, Cas. t. Talb. 139, *per eundem*; *Watts v. Ball*, 1 P. W. 108; *Sweetapple v. Bindon*, 2 Vern. 536; \**Cunningham v. Moody*, 1 Ves. 174; *Casborne v. Scarfe*, 1 Atk. 603; *Dodson v. Hay*, 3 B. C. C. 405.

(*e*) See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92. But see now 33 Vict. c. 14, s. 2.

(*f*) See p. 738.

(*g*) *Forder v. Wade*, 4 B. C. C. 521.

[(*a*) The seisin in deed of the freehold is necessary only in the cases in which, in the language of Lord Coke, "it may be attained unto;" Co. upon Litt. 29a., but where there are no possible means by which the seisin in deed can be acquired, the husband will be entitled to curtesy notwithstanding its absence, for *impotentia excusat legem*. Thus in the case put by Lord Coke, "a man seised of an

advowson or rent in fee hath issue a daughter, who is married, and hath issue and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin," Co. upon Litt. 29a. So where a testator devised an estate to his daughter, her heirs and assigns, for her separate use, and the daughter died in the lifetime of the testator leaving a husband and an only child, it was held that under the operation of the Wills Act the husband was entitled to curtesy, and that as there were no possible means by which the husband could have obtained seisin in the wife's lifetime, it was not required, *Eager v. Furnivall*, 17 Ch. D. 115.]

(*b*) *Parker v. Carter*, 4 Hare, 413.

*married woman* in fee or in tail, the husband is entitled to curtesy, though no rent or interest may have been actually paid during the coverture (*c*). This proceeds on the principle that the *laches* of the trustees shall not prejudice the right of a third person, and, therefore, the claim to curtesy arises in the same manner as if the trustees had actually laid out the money in land and put the parties in possession.

6. *Parker v. Carter*. — And it has been held, that in the case of an ordinary trust *any seisin* of the wife, though she has not possession or receipt of rents, is sufficient to entitle the husband to curtesy. Thus an estate had been vested in trustees upon trust for Carter, during the *joint* lives of himself and Mary his wife, and upon the death of *either* of them, and in default of appointment, upon trust for the children in fee. There were two children, a son and a daughter Elizabeth, and the daughter married Parker; Carter died in 1817, and on his decease the widow, although she had no life estate, held possession of the estate until her own death in 1839. Elizabeth Parker died in 1836, and the question was, whether Parker the husband was tenant by the curtesy, although his wife had never been in receipt of rents. The Vice-Chancellor ruled, that the possession of Carter was the possession of his trustee, and gave to the trustee a seisin of the \* inheritance: that the death of Carter did not in- [\*735] terrupt that seisin, but the trustee was still in actual possession, not by a new title then for the first time accruing, but by continuance of the seisin acquired during the coverture: that the trustee was in such possession for the benefit of the party lawfully entitled thereto, and that he continued in such possession until the entry of Mary, which might be supposed to be a month or more after the death of her husband, and that such interval, there being no adverse possession, would entitle the husband to his curtesy (*a*).

7. *Curtsey where there is separate use*. — If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly

(*c*) *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 B. C. C. 405. (a) *Parker v. Carter*, 4 Hare, 400; see *Casborne v. Scarfe*, 1 Atk. 606.

doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favour of the curtesy (*b*) ; but in a subsequent case (without any allusion, however, to his former opinion), he decided against the claim of the husband (*c*). It has since been determined that the husband is entitled (*d*).

[Defeated by a disposition by the wife. — The right of the husband will however be defeated by a disposition by the wife of her inheritance by act *inter vivos* or by will (*e*).]

8. **Opinion of Sir John Leach.** — It was observed by Sir John Leach that at *law* the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in *equity* he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly, by a direction that upon the death of the wife the *inheritance should descend to the heir of the wife, and that the husband should not be entitled to be tenant by the curtesy* (*f*) ; but this doctrine may admit of question, as there appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet v. Davis* (*g*), which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate but whether an equitable estate arose. A testator had devised lands “to his daughter, the wife of Bennet, for her *separate* [\*736] *use*, exclusive of her husband, to \* hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife’s death go to her heirs. It was contended that the wife could not be a

(*b*) *Roberts v. Dixwell*, 1 Atk. 609.

But see *contra*, *Moore v. Webster*, 3

(*c*) *Hearle v. Greenbank*, 3 Atk.

L. R. Eq. 267.

715, 716.

[(*e*) *Cooper v. Macdonald*, 7 Ch.

(*d*) *Morgan v. Morgan*, 5 Mad.

D. 288.]

408; *Follett v. Tyrer*, 14 Sim. 125;

(*f*) *Morgan v. Morgan*, 5 Mad.

*Appleton v. Rowley*, 8 L. R. Eq. 139;

411.

[*Cooper v. Macdonald*, 7 Ch. D. 288.]

(*g*) 2 P. W. 316.

trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and, that consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the Court held that the husband was a trustee for the wife, and observed, "though the husband might be tenant by the curtesy (*viz.*, of the legal estate), yet he should be but a trustee for the *heirs* of the wife." The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate, but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the Court. Even assuming the remark to have been made advisedly, the view of the Court may have been that the curtesy of the husband was excluded on the ground now overruled, *viz.*, that the trust being not simply for the wife and her heirs but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon (*a*).

[9. **Effect of Married Women's Property Act, 1882.** — Under the Married Women's Property Act, 1882, a married woman is enabled to acquire, hold, and dispose of property as her separate estate as if she were a feme sole, without the intervention of any trustee, and the question has been suggested whether a husband can become entitled to curtesy out of property which the wife has acquired as separate estate under the Act. It is conceived that, in the event of the wife not otherwise disposing of the property, he will be entitled to his curtesy in the same manner as if the property had independently of the Act been settled for the separate use of the wife (*b*).]

10. **Distinction between dower and curtesy.** — It must be acknowledged, that as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower, or the admission of curtesy, was an anomaly. Some high

(*a*) See *Hearle v. Greenbank*, 3 Atk. 715, 716; *Morgan v. Morgan*, 5 Mad. 408.

[(*b*) 45 & 46 Vict. c. 75. See as to the effect of the Act, *infra*, p. 751, *et seq.*]

authorities, as Lord Talbot (*c*), Sir T. Clarke (*d*), and Lord Loughborough (*e*), regarded the allowance of *curtesy* as the exception; and the ground upon which they pro-  
[\*737] ceeded was that as trusts followed \*the likeness of the use, and there was no curtesy of the use, there could be none of the trust. On the other hand, Sir J. Jekyll (*a*), Lord Hardwicke (*b*), Lord Cooper (*c*), Lord Mansfield (*d*), Lord Henley (*e*), and Lord Redesdale (*f*), thought that consistency would be restored by the admission of the title to *dower*; for since the Statute of Frauds, they argued the system of trusts had undergone considerable alteration, and was conducted upon a much more liberal footing: the rule now was, that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate had a like right against the equitable. Thus either argument had a fair show of reason to support it; but the latter view was, no doubt, more in harmony with the system of trusts as eventually established.

**How curtesy came to be allowed and not dower.**—The Courts, according to Lord Redesdale, were led to refuse dower out of trust estates from a well-founded fear of affecting the titles to a large proportion of the estates in the country, because parties had been acting on the footing that dower did not attach to a trust; but the same objection did not apply to allowing *tenancy by the curtesy*, inasmuch as no person would purchase an estate without the concurrence of the husband (*g*).

**11. Late Dower Act.**—By a late Act (*h*), the widow is entitled to dower *in equity* where the husband dies beneficially entitled to any interest (not conferring a title to dower at law) which whether wholly equitable, or partly legal and

(*c*) *Chaplin v. Chaplin*, 3 P. W. 234; *Attorney-General v. Scott*, Cas. t. Talb. 139.

(*d*) *Burgess v. Wheate*, 1 Eden, 196-198.

(*e*) *Dixon v. Saville*, 1 B. C. C. 327.  
(*a*) *Banks v. Sutton*, 2 P. W. 713, 714.

(*b*) *Casburne v. Casburne*, 2 J. & W. 200.

(*c*) *Watts v. Ball*, 1 P. W. 109.

(*d*) *Burgess v. Wheate*, 1 Eden, 224.

(*e*) *Ib.* 249-251.

(*f*) *D'Arcy v. Blake*, 2 Sch. & Lef. 388.

(*g*) *D'Arcy v. Blake*, 2 Sch. & Lef. 388.

(*h*) 3 & 4 W. 4, c. 105.

partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy (*i*). But in either case the wife will not be entitled to dower out of any property absolutely disposed of by the husband in his lifetime or by will (*j*). And by the Act a widow is not entitled to dower out of any land, when in the deed of conveyance thereof to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower (*k*). And the widow's right of dower may also be barred by declaration contained in the husband's will (*l*).

\* 12. **Exceptions from Act.**—The Act does not extend to the dower of any widow married *on or before the 1st January, 1834* (*a*), and does not apply to *copyholds* (*b*), though it does to lands of *gavelkind* tenure (*c*).

13. **Dower uses no bar to widow married since the Act.**—The ordinary *uses to bar dower* vest in the husband the whole inheritance in possession, partly at law and partly in equity, and therefore, *in the absence of declaration by him to the contrary*, must confer on a widow, *married after the Act*, a right to dower (*d*).

14. **Intent to bar dower expressed in deed dated before the Act inoperative.**—And if an estate was conveyed *before the Act* to uses in bar of dower with words expressing the *intent* of the limitations to be to prevent any wife of the purchaser from becoming dowable, such words cannot amount to a declaration under the Act (*e*); and, if they did, the deed, as being executed before 1st January, 1834, could not prejudice any right of dower (*f*); and consequently the widow married after the Act will, in such a case, be dowable (*g*).

(*i*) *Ib.* sect. 2.

(*j*) 3 & 4 W. 4, c. 105, sect. 4. But whether the husband has devised his estate in such a way as to manifest an intention that the estate should be free from dower, is a question often of great nicety. See *Gibson v. Gibson*, 1 Drew. 42; *Lacey v. Hill*, 19 L. R. 346, and *Lord St. Leonards on Real Property Statutes*, p. 254.

(*k*) 3 & 4 W. 4, c. 105, sect. 6.

(*l*) *Ib.* sect. 7.

(*a*) 3 & 4 W. 4, c. 105, sect. 14.

(*b*) *Powdrell v. Jones*, 2 Sm. & G. 407; *Smith v. Adams*, 5 De G. M. & G. 712.

(*c*) *Farley v. Bonham*, 2 J. & H. 177.

(*d*) *Fry v. Noble*, 20 Beav. 602.

(*e*) *Fry v. Noble*, 7 De G. M. & G. 687.

(*f*) *Fry v. Noble*, 20 Beav. 598, per M. R. relying on sect. 14.

(*g*) *Fry v. Noble*, 20 Beav. 598; 7

15. Dower out of equitable fee subject to executory devise. — And a widow married since the Act is dowable of an *equitable estate* limited to the husband in fee, but subject to a *limitation over* on his dying without issue living at his death and which event has since occurred (*h*).

## SECTION VI.

## OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST.

Under the above title we propose, *First*, To advert shortly to the effect of marriage upon property, held upon trust for a *feme covert* simply, and not for her separate use, treating, in order, of pure personalty, chattels real, and real estate of freehold or inheritance; and, *Secondly*, To consider the nature of a wife's *separate estate* (*i*).

*First*. Of a *feme covert's* equitable interest generally.<sup>1</sup>

[And here we may observe, that the mutual rights of husband and wife in the property of the wife have recently

De G. M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.

(*h*) *Smith v. Spencer*, 2 Jur. N. S. 778.

(*i*) This section in the third and fourth editions was added to and much improved by the author's friend, the late Mr. F. O. Haynes.

<sup>1</sup> *Married women; right to a settlement*. — Personal property held in trust for a *feme covert* belongs to the husband; *Crook v. Turpin*, 10 B. Mon. 244; *Mumford v. Murray*, 1 Paige, 620; and the same is true of *choses in action*, if there reduced to possession; *Murphy v. Grice*, 2 Dev. & B. Eq. 199; a proper settlement, out of her equitable estate, may be made for the wife; *Moore v. Moore*, 14 B. Mon. 259; *Guild v. Guild*, 16 Ala. 122; *Barron v. Barron*, 24 Vt. 375; *Page v. Estes*, 19 Pick. 269; *Poindexter v. Jeffries*, 15 Gratt. 363; *Corley v. Corley*, 22 Ga. 178; *Chase v. Palmer*, 25 Me. 342; *Davis v. Newton*, 6 Met. 537; *Glen v. Fisher*, 6 Johns. Ch. 33; *Van Duzer v. Van Duzer*, 6 Paige, 368; but see *Lassiter v. Dawson*, 2 Dev. Eq. 383; settlements must be made, if at all, before the husband reduces to possession the property in question; *Pool v. Morris*, 29 Ga. 374; *Wickes v. Clarke*, 8 Paige, 161; *Mitchell v. Sevier*, 9 Humph. 146; *Whitesides v. Dorris*, 7 Dana, 107; or an attempt made for a settlement before possession is obtained; *Crook v. Turpin*, 10 B. Mon. 243; *Fry v. Fry*, 7 Paige, 461; *Dearin v. Fitzpatrick*, Meigs, 551; if husband holds property in some other capacity than that of husband, it is no hindrance to effecting a settlement; *Barron v. Barron*, 24 Vt. 375; *Goche-  
naur's Est.* 11 Harris, 460. A wife may seek a settlement by a bill in equity; *Wright v. Arnold*, 14 B. Mon. 642; *Wiles v. Wiles*, 3 Md. 1; and can if necessary obtain an injunction meanwhile; *Dumond v. Magee*, 4 Johns. Ch. 318.

undergone such great changes, that it will be well, for the sake of simplicity, to deal separately with (A), the law as

Courts cannot interfere unless they are such as would have jurisdiction of the trust assets; *Wheeler v. Bowen*, 20 Pick. 563; *Parsons v. Parsons*, 9 N. H. 309; *Allen v. Allen*, 6 Ired. Eq. 293. A *feme covert* cannot claim a settlement after giving her assent to a disposition of the property; *Smith v. Atwood*, 14 Ga. 402; *Wright v. Arnold*, 14 B. Mon. 638. Where there are special reasons why the husband should not reduce personalty to possession, the courts will interfere, regardless of any technical objections to so doing; *Haviland v. Myers*, 6 Johns. Ch. 178; *Rees v. Waters*, 9 Watts, 90; *Renwick v. Renwick*, 10 Paige, 421; *Chambers v. Perry*, 17 Ala. 726. It is not necessary that the property should be within the jurisdiction of the court; *Guild v. Guild*, 16 Ala. 122. Such a settlement may be made for the wife, not only as against the husband, but also as against his creditors or any one claiming by, through or under him in any way; *Gassett v. Grout*, 4 Met. 486; *Andrews v. Jones*, 10 Ala. 401; *Hord v. Hord*, 5 B. Mon. 81; *Phillips v. Hassel*, 10 Humph. 197; *Kenny v. Udall*, 5 Johns. Ch. 464; *Athey v. Knotts*, 6 B. Mon. 24; *Heath v. Heath*, 2 Hill, Ch. 100. A settlement cannot be had in an estate in reversion or remainder, until such time as they might be reduced to possession; *Goodwin v. Moore*, 4 Humph. 221; *Reese v. Holmes*, 5 Rich. Eq. 531; *Sale v. Saunders*, 24 Miss. 24; but see *Jackson v. Sublett*, 10 B. Mon. 469; *Weeks v. Weeks*, 5 Ired. Eq. 111; the amount involved is not material; *Roberts v. Collett*, 6 Sm. & Gif. 138. If a settlement has been made, courts will not compel another; *Martin v. Martin*, 1 Comst. 473. The amount which will be settled upon the wife depends upon circumstances; *Napier v. Howard*, 3 Kelley, 205; *Barron v. Barron*, 24 Vt. 375; *McVey v. Boggs*, 3 Md. Ch. 94. A settlement must be for wife and children; *Andrews v. Jones*, 10 Ala. 401; *Udall v. Kenney*, 3 Cow. 609; *Howard v. Moffatt*, 2 Johns. Ch. 206. Children cannot ask it; *Martin v. Sherman*, 2 Sandf. Ch. 341; but see *Hill v. Hill*, 3 Strob. Eq. 94; *Mumford v. Murray*, 1 Paige, 621.

*Reduction to possession.*—The husband must have done some act to reduce the property into his possession; *Dunn v. Sargent*, 101 Mass. 336; *Hayward v. Hayward*, 20 Pick. 517; *Rice v. Thompson*, 14 B. Mon. 379; *Searing v. Searing*, 9 Paige, 283; *Edwards v. Sheridan*, 24 Conn. 165; *Ross v. Wharton*, 10 Yerg. 190; as if he uses the money for himself; *Ellis v. Baldwin*, 1 Watts & S. 253; or takes a legacy as his own; *Pierce v. Thompson*, 17 Pick. 391; or sells the property; *Dunn v. Sargent*, 101 Mass. 336; *Wardlaw v. Gray*, 2 Hill, Eq. 644. If the property has not been actually received, it is not in possession; *Smith v. Atwood*, 14 Ga. 402; *George v. Goldsby*, 23 Ala. 333; *Ryan v. Spruill*, 4 Jones, Eq. 27. The bringing of a suit or even the obtaining of a judgment is not sufficient for reducing the property to possession; *Probate Court v. Niles*, 32 Vt. 775; *Pike v. Collins*, 33 Me. 43; *Knight v. Brawner*, 14 Md. 1; *Mason v. McNeill*, 23 Ala. 201; *Hall v. McLain*, 11 Humph. 425; there must have been an execution or a transfer of the property; *Alexander v. Crittenden*, 4 Allen, 342; a receipt for property is not in itself sufficient; *Hake v. Fink*, 9 Watts, 336; *McDowell v. Potter*, 8 Barr, 191; the holding of the paper securities is insufficient; *Hall v. Young*, 37 N. H. 134; *Barber v. Slade*, 30 Vt. 191; *Pickett v. Everett*, 11 Mo. 568. The intention of the husband is material, and certain acts may or may not reduce the property to possession according to his intention; *Gochenaur's Est.*, 23 Pa. St. 460; *McDowell v. Potter*, 8 Barr, 191; *Gray's Est.*, 1 Barr, 327. If the property has been actually reduced to



[\*739] regards cases not affected by the \* Married Women's Property Act, 1882, and (B), the modifications introduced by that Act.

(A.) As to cases not affected by the Married Women's Property Act.

The cases to be considered under this head will be confined to those in which property accrued before the 1st January, 1883, to women who were married before that date.]

1. **Pure personal estate not settled to separate use.** — As respects *pure personal estate* (by which expression is meant personalty *exclusive of chattels real*, such as chattels personal, legacies, and other *choses en action*), not settled to the wife's separate use, the husband's power over the *equitable* estate is regulated by his power over the *legal* estate. A personal chattel, as furniture, held in trust for the wife, belongs in

possession, the rights of creditors cannot be destroyed; *Nolen's App.* 23 Pa. St. 37; *Searing v. Searing*, 9 Paige, 283; *Starke v. Starke*, 3 Rich. 438; stocks must be transferred to name of husband for possession; *Arnold v. Ruggles*, 1 R. I. 165; receiving dividends or interest is a reduction *pro tanto* only; *Stanwood v. Stanwood*, 17 Mass. 57; likewise of a part payment of the principal; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; an indorsement and transfer of negotiable paper is sufficient; *Allen v. Wilkins*, 3 Allen, 322; *Tryon v. Sutton*, 13 Cal. 490; *Hemmingway v. Mathews*, 10 Tex. 207. Agreements to do certain things, which in themselves would be sufficient, are inadequate; *Stout v. Levan*, 3 Barr, 235; *Tritt v. Colwell*, 31 Pa. St. 228; *Casey v. Wiggin*, 8 Gray, 231; *Dixon v. Dixon*, 18 Ohio, 113. The reduction must take place before the death of the husband, if at all; *Mason v. McNeill*, 23 Ala. 201; *Flory v. Becker*, 2 Barr, 471; *Kreider v. Boyer*, 10 Watts, 58; *Siter v. M'Clanachan*, 2 Gratt. 280. The above decisions have been modified in some jurisdictions, and actual holding of the property is not necessary, if sufficient has been done to show the purpose, or it is clear that reduction was intended; *Manion v. Titsworth*, 18 B. Mon. 582; *Tuttle v. Fowler*, 22 Conn. 58; *Parsons v. Parsons*, 9 N. H. 309; *Webb's App.* 21 Pa. St. 248; *Barnes v. Pearson*, 6 Ired. Eq. 482; *Slaymaker v. Bank*, 10 Barr, 373. Assignees may take on conditions, even though there has been no possession; *Poor v. Hazleton*, 15 N. H. 568; *Shay v. Sessaman*, 10 Barr, 434. An assignment without consideration, or fraudulent, will not stand; *Hartman v. Dowdel*, 1 Rawle, 279; *Tuttle v. Fowler*, 22 Conn. 58; and this has been carried so far that it is difficult or impossible to prevent creditors from seizing the trust property; *Holbrook v. Waters*, 19 Pick. 354; *Wheeler v. Bowen*, 20 Pick. 563; *Vance v. McLaughlin*, 8 Gratt. 289; *Mellinger's Ad. v. Bausman*, 45 Pa. St. 522. It is a personal privilege of the husband; *Andover v. County*, 37 N. H. 437. If a husband and wife hold property jointly, he may reduce it to possession, otherwise it survives to her; *Hayward v. Hayward*, 20 Pick. 517; *Pike v. Collins*, 33 Me. 43; and in former cases creditors can seize it; *Rivers v. Thayer*, 7 Rich. Eq. 166. See the statutes relating to married women in the several states, which materially change the law.

equity to the husband absolutely. But as to *choses en action*, as legacies, the right of the husband depends upon the fact of *reduction into possession* (a). If the wife's equitable interest be a present one, and the trustee is willing to facilitate the reduction into possession by payment, transfer, &c., to the husband, the trustee is at liberty to do so, and will not thereby incur any personal responsibility (b). On the other hand, the trustee, in whose hands the wife's *chose en action* is, may, in a proper case, insist on having it settled; and if for that purpose he pay it, by arrangement with the husband, to the trustees of an existing settlement, to be held by them upon the trusts thereof, such settlement will be as valid as if made by the Court (c). But a wife has no equity to a settlement until her *antenuptial debts* have been discharged (d); and she has no such equity against a *purchaser* where the fund has been aliened by the husband, and the alienation is binding on the wife from her having taken a *fraudulent part* in the alienation (e).

**Reduction into possession.**—An actual reduction into possession (f) is required for defeating the wife's rights (g); and in the absence of reduction into possession by the husband during his life, the equitable interest passes \* to the wife by survivorship (a). It follows that [\*740]

(a) *Purdew v. Jackson*, 1 Russ. 45, 46.

(b) See *Re Swan*, 2 H. & M. 37.

(c) *Montefiore v. Behrens*, 1 L. R. Eq. 171. In this case M. R. speaks of the wife's right to have it settled as she pleased, but as to the wife's capacity, see *Re Swan*, 2 H. & M. 37; and see *Re Roberts' Trust*, 38 L. J. N. S. Ch. 708.

(d) *Barnard v. Ford*, 4 L. R. Ch. App. 247; *Miller v. Campbell*, W. N. 1871, p. 210.

(e) *Re Lush's Trust*, 4 L. R. Ch. App. 591; [*Cahill v. Cahill*, 8 App. Cas. 437; *S. C. nom. Cahill v. Martin*, 5 L. R. Ir. 227, 7 L. R. Ir. 361.]

(f) As to the circumstances under which a lodgment in Court of a *chose en action* belonging to the wife

will amount to a reduction into possession, see *Donnelly v. Foss*, 7 L. R. Ir. 439.]

[(g) A release by the husband of a *chose en action* payable in *presenti* is effectual to bar the wife's equity to a settlement, and if the release be of a legacy by deed poll it will be operative although there was no legal personal representative in existence at the time of its execution; and the release is good although the husband was living apart from the wife and not contributing to her support, *McCreery v. Searight*, 5 L. R. Ir. 206, 641; *Harrison v. Andrews*, 13 Sim. 595; see *Roper on Husband & Wife*, vol. 1, p. 240 *et seq.*]

[(a) If the husband and wife appoint an agent to receive a *chose en*

where the wife's interest remains *reversionary* until after the husband's death, and the wife survives, she *necessarily* takes by survivorship (*b*). And so if the marriage be dissolved, or a judicial separation be decreed (*c*), [or a protection order be obtained (*d*)] before the *chose en action* is got in, it belongs to the wife. A similar principle applies, where the interest of the wife may be viewed as partly possessory and partly reversionary,—as where the wife is entitled during her own life; in which case, the husband cannot bind the interest of the wife beyond the duration of the coverture (*e*). So, even if the husband assign the wife's reversionary interest, and it subsequently, *during the husband's lifetime*, becomes possessory, the wife's right by survivorship remains, unless reduction into possession be actually effected by the husband in his lifetime (*f*).

2. *Equity to a settlement.*—The *equity to a settlement*

*action* of the wife, and he receives it, but does not pay it over to either husband or wife, his receipt nevertheless operates as a reduction into possession by the husband, *Huntley v. Griffith*, F. Moore, 452, Goldsborough, 2d ed. p. 159, pl. 91; and this will also be the case, where the *chose en action* is the distributive share of the wife in the estate of an intestate of which she is the administratrix, *Re Barber*, 11 Ch. D. 442. If the wife with the assent of her husband receives a *chose en action*, it operates as a reduction into possession by him, *Rogers v. Bolton*, 8 L. R. Ir. 69; but the payment to the wife without the husband's assent will not prevent the husband, if he survive her, from suing for the *chose en action* as her legal personal representative, S. C.]

(*b*) *Purdew v. Jackson*, 1 Russ. 1; *Honnor v. Morton*, 3 Russ. 65. [In *Widgery v. Tepper*, 5 Ch. D. 516, affirmed 7 Ch. D. 423, a husband sold his wife's share as one of the next of kin of an intestate in certain chattels and received the purchase money for her share. After the husband's death, which occurred in the wife's lifetime,

it was discovered that the sale had taken place under circumstances which it was contended rendered it voidable, and on the question as to who was entitled to take proceedings to set the sale aside, it was held that the right to do so was in the husband's representatives and did not survive to the wife.]

(*c*) [*Wells v. Malbon*, 31 Beav. 48;] *Re Insole*, 35 Beav. 92; *Prole v. Soady*, 3 L. R. Ch. App. 220; *Johnson v. Lander*, 7 L. R. Eq. 228; *Heath v. Lewis*, 4 Giff. 665; *Swift v. Wenman*, 10 L. R. Eq. 15; and see *Fussell v. Dowding*, 14 L. R. Eq. 421; 27 Ch. D. 237; *Jessop v. Blake*, 3 Giff. 639; *Fitzgerald v. Chapman*, 1 Ch. D. 563.

[(*d*) *Re Coward and Adam's Purchase*, 20 L. R. Eq. 179; *Nicholson v. Drury Buildings Estate Company*, 7 Ch. D. 48; *Re Emery's Trusts*, 50 L. T. N. S. 197; 32 W. R. 357.]

(*e*) *Stiffe v. Everitt*, 1 M. & Cr. 37; *Harley v. Harley*, 10 Hare, 325.

(*f*) *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. 553; *Baldwin v. Baldwin*, 5 De G. & Sm. 319; and see *Hamilton v. Mills*, 29 Beav. 193.

appears to have had its origin (*g*) in cases where the trustee, declining to pay, transfer, &c., the *wife's possessory interest* to the husband, and the husband filing a bill against the trustee to compel *payment, transfer, &c.*, the Court held that those who seek equity must do equity; and declined to assist \*the husband in obtaining the [\*741] wife's equitable interest, except upon the terms of some portion of it being settled for the benefit of the wife and her issue.

[But where property is given to husband and wife, inas-much as by the unity of the persons in law they take by entirety, and the husband is entitled in his own right to the entirety, during his life, the wife will have no equity to a settlement out of any part of the property (*a*).]

3. **Feme may assert her equity to a settlement actively.**— Whatever may have been the source of this equity, it is undoubtedly one which the wife has a right, according to the now established practice of the Court, to assert *actively*, either by an action (*b*), or, in the case of an already existing suit, by petition (*c*), at any time before the husband has finally reduced the equitable interest into possession; and possession

(*g*) See *Bosvil v. Brander*, 1 P. W. 458; *Browne v. Elton*, 3 P. W. 202; *Wallace v. Auldjo*, 2 Dr. & Sm. 216; *Osborn v. Morgan*, 9 Hare, 432.

[(*a*) *Atcheson v. Atcheson*, 11 Beav. 485; *Ward v. Ward*, 14 Ch. D. 506; *Re Bryan*, 14 Ch. D. 516. See as to cases since the recent Act, *Re March*, 24 Ch. D. 222, 27 Ch. D. 166.]

(*b*) *Lady Elibank v. Montolieu*, 5 Ves. 737; *Duncombe v. Greenacre*, 28 Beav. 472; on appeal, 2 De G. F. & J. 509. [The right is a personal one in the wife, and, on her death without having taken any steps to assert it, fails, and cannot be set up by her children. If, however, the wife has taken proceedings to enforce her equity, and has obtained a decree or order referring the matter to the Judge in chambers to approve a proper settlement, the children are entitled to the benefit of that decree

or order, and may bring an action to enforce the settlement. But if the wife dies after the institution of the action, but before a decree or order for a settlement has been made, the children, who have no equity except to enforce a judgment obtained in their favour, cannot compel a settlement, *Lloyd v. Williams*, 1 Mad. 450; *De la Garde v. Lempriere*, 6 Beav. 344; *Wallace v. Auldjo*, 2 Dr. & Sm. 216, 234; and even after a decree for a settlement has been made, the wife may, while the settlement is still in *fieri* and unexecuted, come into Court and waive her right, and so disappoint the claims of the children, *Lloyd v. Williams*, *ubi sup.*; *Pemberton v. Marriott*, 47 L. T. N. S. 332.]

(*c*) *Greedy v. Lavender*, 13 Beav. 62; *Scott v. Spashett*, 3 Mac. & G. 599; [*Re Robinson's Settled Estate*, 12 Ch. D. 188.]

by the husband in the mere character of *executor*, or *administrator*, or *trustee*, and not as husband in his marital right will not be deemed a reduction into possession to defeat the equity to a settlement (*d*). [And the equity may be enforced in respect of a fund which is possessory although not actually distributable, as in the case of a share of an estate which is being administered by the Court, but which will not be distributable until further consideration (*e*).] It is equally clear that the equity is one which the wife has a right to waive, by consenting in open Court (*f*) to the receipt [\*742] of the equitable interest by the \*husband, [but an infant is not capable of giving such consent (*a*).] But the wife may revoke her consent at any time before the actual transfer (*b*), and she has no power of consenting *out of Court*, and therefore a trustee who thinks a settlement ought to be executed, which the husband rejects, is justified, notwithstanding the wife's wishes to the contrary, in paying the money into Court (*c*). Where the husband, an executor, is a defaulter to the estate, the wife, one of the residuary legatees, has no equity to a settlement as against the claims of other persons who suffer by the default (*d*). But if the husband be a debtor to the estate of an intestate the wife's equity will prevail, and the administrator cannot stop the debt as against the wife (*e*).

4. **As to fund under 200*l*.**—In one case where the fund was under 200*l*., and therefore by the practice of the Court payable to the husband without the consent of the wife, the wife, though the husband had deserted her, had no equity

(*d*) *Baker v. Hall*, 12 Ves. 497; *Wall v. Tomlinson*, 16 Ves. 413; [*Re Birchall*, 44 L. T. N. S. 243.]

[(*e*) *Re Robinson's Settled Estate*, 12 Ch. D. 188.]

(*f*) And now as to interests acquired under an instrument made after 31st December, 1857, the wife may, after the fund has become possessory, release her equity to a settlement by deed acknowledged, 20 & 21 Vict. c. 57, s. 1.

[(*a*) *Shipway v. Ball*, 16 Ch. D. 376.]

(*b*) *Penfold v. Mould*, 4 L. R. Eq. 562.

(*c*) *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts' Trusts*, 38 L. J. N. S. Ch. 708, [where the trustees were saddled with costs for paying the money into Court.]

(*d*) *Knight v. Knight*, 18 L. R. Eq. 487.

(*e*) *In re Cordwell's Estate*, 20 L. R. Eq. 644.

to a settlement (*f*). But this case has since been overruled, and the Court has directed the whole fund, though it was under 200*l.*, to be settled upon the wife and children (*g*).

5. **Equity to settlement prevails against assignees in law or by deed.**—The wife's equity to a settlement subsists not only against the husband himself, but also, *as a general rule*, against those claiming under him, as a trustee under his bankruptcy, or an assignee by deed, even for valuable consideration; in fact, the assertion of the equity most commonly takes place in cases where the husband has become bankrupt or has assigned the fund. Where, owing either to the trustee refusing to pay without suit, or to the wife's taking independent proceedings of her own, the fund comes under the control of the Court, the latter commonly considers that payment of *one-half* to the husband or the assignees, and the settlement of the other half on the *wife and children*, is, in the absence of special circumstances, a reasonable apportionment (*h*). As the moiety paid to the husband or assignees represents the whole of the husband's interest, the entirety of the other moiety must be settled on the wife and children, to the exclusion of the \*hus- [\*743] band (*a*), except on failure of issue (*b*), in which event the husband will take, whether he survive the wife or not (*c*). It would appear that in Lord Eldon's time a rule

(*f*) *Foden v. Finney*, 4 Russ. 428.  
(*g*) *Re Cutler*, 14 Beav. 220; [*Re Kincaid's Trusts*, 1 Drew. 326;] *Re Merriman's Trust*, 10 W. R. 334.

(*h*) *Spirett v. Willows*, 1 L. R. Ch. App. 520; *Napier v. Napier*, 1 Dru. & War. 407; *Vaughan v. Buck*, 1 Sim. N. S. 287; *Bagshaw v. Winter*, 5 De G. & Sm. 468; *Marshall v. Gibbings*, 4 Ir. Ch. Rep. 276; *Re Grove's Trusts*, 3 Giff. 582. In *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215, the L. J. J. gave the husband a third only.

(*a*) *Lloyd v. Williams*, 1 Mad. 450; *Barker v. Lea*, 6 Mad. 330; *Whittem v. Sawyer*, 1 Beav. 593.

(*b*) *Carter v. Taggart*, 5 De G. &

Sm. 49; *Spirett v. Willows*, 12 Jur. N. S. 538; *Gent v. Harris*, 10 Hare, 383; *Bagshaw v. Winter*, 5 De G. & Sm. 468.

(*c*) *Croxton v. May*, 9 L. R. Eq. 404; *Walsh v. Wason*, 8 L. R. Ch. App. 482; but see *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215. For the details of the proper settlement, see *Spirett v. Willows*, 4 L. R. Ch. App. 407; [*Cogan v. Duffield*, 2 Ch. D. 44; *Re Gowan*, 17 Ch. D. 778; and as to giving the wife a power of appointment among the children, see *Oliver v. Oliver*, 10 Ch. D. 765; which case, however, was disapproved of in *Re Gowan*.]

existed against giving the wife the *whole* fund (*d*). But subsequently, in a case (*e*) in the Exchequer, where the husband was *insolvent*, Baron Alderson directed a settlement of the *whole* fund, considering *insolvency* to afford ground for a special exception. At the present day it is clear that the Court, wherever the special circumstances warrant the step (as, for instance, where the husband has abandoned the wife, or is not in a position to maintain her, and the fund is not more than sufficient for her maintenance) will settle the whole corpus, and, it seems, the arrears of income (*f*) on the wife and children (*g*). In every case the Court exercises a discretion as to the amount with reference to the particular circumstances (*h*) — namely, the conduct of the parties (*i*), the wife's means of livelihood (*j*), the settlement, if any, previously made upon her (*k*), and the sums before received by the husband in respect of the wife's fortune (*l*).

[\*744] Where the wife has been amply provided for, \* and the husband has not misconducted himself, the Court

(*d*) *Dunkley v. Dunkley*, 2 De G. M. & G. 396.

(*e*) *Brett v. Greenwell*, 3 Y. & C. 230. [But Sir E. Sugden when Lord Chancellor of Ireland declined to follow this case. See *Napier v. Napier*, 1 Dru. & War. 407.]

(*f*) *Wilkinson v. Charlesworth*, 10 Beav. 324; but see *Newman v. Wilson*, 31 Beav. 34.

(*g*) *Smith v. Smith*, 3 Giff. 121; *Bowyer v. Woodman*, 3 L. R. Eq. 313; *Duncombe v. Greenacre* (No. 2), 29 Beav. 378; *Re Grove's Trust*, 3 Giff. 582; *Bray v. Laycock*, 2 Eq. Rep. 385; *Gardner v. Marshall*, 14 Sim. 575; *Koeber v. Sturgis*, 22 Beav. 589; *Re Kincaid*, 1 Drew. 326; *Watson v. Marshall*, 17 Beav. 363; *Ward v. Yates*, 1 Dr. & Sm. 80; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Carter v. Taggart*, 5 De G. & Sm. 49; *Duncombe v. Greenacre*, 28 Beav. 472; *Gent v. Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31; *Re Tutin's Trust*, W. N. 1869, p. 141; *Nicholson v. Carline*,

22 W. R. 819; *Re Cordwell's Estate*, 20 L. R. Eq. 644; and see [*Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779;] *Bonner v. Bonner*, 17 Beav. 86. In one case where the wife had been abandoned by her husband for upwards of 20 years, the Court ordered the corpus of the fund to be paid to the wife as a *feme sole*; *Re Pope's Trust*, W. N. 1873, p. 79.

(*h*) *Re Suggitt's Trust*, 3 L. R. Ch. App. 215.

(*i*) *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Barrow v. Barrow*, 5 De G. M. & G. 782; [*Boxall v. Boxall*, 27 Ch. D. 220.]

(*j*) *Bagshaw v. Winter*, 5 De G. & Sm. 467; *Ex parte Pugh*, 1 Drew. 202.

(*k*) *Scott v. Spashett*, 3 Mac. & G. 599; *Spicer v. Spicer*, 24 Beav. 365; *Spirett v. Willows*, 12 Jur. N. S. 538.

(*l*) *Gardner v. Marshall*, 14 Sim. 575; *Vaughan v. Buck*, 1 Sim. N. S. 287.

has dismissed the wife's bill with costs, and left the husband at liberty to follow up his marital rights (*a*).

[6. Part of the fund retained in Court with liberty to apply. — Where a married woman, upon being examined, expressed a wish that part of the fund to which she was entitled should be retained in Court, and the income paid to her, with liberty for her to apply for payment of the capital at a future period, if she desired it, the Court made the order, settling the fund upon her for life, with remainder to her children, with liberty for her to apply to the Judge at chambers for a transfer of all or any of the capital to her, by way of revocation of the settlement (*b*).]

7. How far life interest of wife is subject to equity to a settlement. — Upon principle it would seem that the wife's equity to a settlement ought *in all cases* to be the same, whether it be claimed against the husband or his trustee in bankruptcy or his assignee for value. There is, however, an exception where the subject matter against which the equity is asserted is a *life interest* of the wife. In this case, so long as the husband maintains the wife, he is entitled to receive the income of her life estate, and there can be no equity to a settlement (*c*). If, however, he deserts her, or is divorced by reason of his misconduct, the Court will not allow him to receive the income without securing at least a portion of it for the maintenance of the wife (*d*); and *pari ratione* where the husband becomes bankrupt and the wife is left without the means of subsistence, the same equity will be enforced against the trustee in bankruptcy (*e*). But where the husband assigns the income for value while duly discharging

(*a*) *Giacometti v. Prodgers*, 14 L. R. Eq. 253; 8 L. R. Ch. App. 338.

(*b*) *Re Craddock's Trust*, W. N. 1875, p. 187; see *Boxall v. Boxall*, 27 Ch. D. 220, 225.]

(*c*) *Bullock v. Menzies*, 4 Ves. 798; *Re Duffy's Trust*, 28 Beav. 386, and cases there cited. [But see the observations in *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779.]

(*d*) *Barrow v. Barrow*, 5 De G. M.

& G. 782; *Tidd v. Lister*, 3 De G. M. & G. 870.

(*e*) *Vaughan v. Buck*, 1 Sim. N. S. 384; *Squires v. Ashford*, 23 Beav. 132; *Barnes v. Robinson*, 1 N. R. 257. [See *Taunton v. Morris*, 8 Ch. D. 453, affirmed 11 Ch. D. 779, where the court in the case of an insolvent debtor who contributed nothing to the support of his wife, gave the whole income to the wife to the exclusion of the provisional assignee.]



the marital obligation of maintenance, and *subsequently* deserts his wife, the wife is held to have no equity against the particular assignee for value, for the very object of the husband in making the alienation may have been to find the means for better providing for his wife, and the purchaser cannot be involved in such an enquiry (*f*).

8. **Right by survivorship.** — It must be remembered [\*745] that the wife's *equity to a settlement* \* and her *right by survivorship* are two entirely distinct things. The former does not apply where the fund is *reversionary* (*a*), but arises only when the fund is ready for *reduction into possession*, and may be waived by the wife as before stated; the latter the wife cannot, by any act during coverture, deprive herself of, except so far as the provisions of the recent Act (*b*) may enable her so to do. Occasionally resort has been had to certain ingenious devices for the purpose of bringing the wife's reversionary interest into possession. Thus where a fund has been settled on A. for life, and after his decease on B. a married woman absolutely, the husband of B., in order to reduce the wife's *chose en action* into possession, has purchased the prior life interest, and had it assigned to himself or his wife. But this scheme will not bear examination, for if the assignment be made to the *husband*, then, as the life interest was possessed by him in his *own right*, and the reversionary interest in *right of his wife*, the two will not coalesce; and if the assignment was made to the wife so that the husband would have both interests in the same right, then the *feme* on the coverture ceasing might disclaim the accession of interest and so prevent the intended merger. The late Vice Chancellor of England held in several cases that the *chose en action* could thus be reduced into possession (*c*), and on one occasion Lord Cottenham, on an

(*f*) Tidd v. Lister, 10 Hare, 140; 3 De G. M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386; [and see Taunton v. Morris, 11 Ch. D. 779.]

(*a*) Osborn v. Morgan, 9 Hare, 432.

(*b*) 20 & 21 Vict. c. 57; see p. 23, *supra*.

(*c*) Creed v. Perry, 14 Sim. 592; Bean v. Sykes, *Ib.* 593; Lachton v. Adams, *Ib.* 594; Hall v. Hugonin, *Ib.* 595; Bishop v. Colebrook, 16 Sim. 39; Wilson v. Oldham, 5th March, 1841, MS.; see the opinion of the late Mr. Jacob in 3d. edit. p. 371.

application to take the wife's consent, seems to have assented to the doctrine (*d*). But in a case before Lord Langdale, M. R., the question was considered to involve too much difficulty to be disposed of on petition (*e*); and the case of *Whittle v. Henning* (*f*) before Lord Cottenham, and other cases (*g*), have since decided that a reversionary *chose en action* of the wife cannot by means of this machinery be reduced into possession so as to be made disposable. However, if a fund be settled on A. for life, and the remainder be appointed to the *feme covert* for her *separate use*, and her power of anticipation is not restrained, the tenant for life and *feme covert* in remainder can deal with the fund (*h*).

[9. **Administration by surviving husband to wife's estate.** — If the husband assign the reversionary interest of his wife in a *chose en action*, and survive her, and the interest be not reduced \* into possession during her life, administration to the wife's estate must be taken out before the assignee of the husband can compel payment of the interest assigned (*a*).]

10. **Equitable chattels real of feme covert.** — As regards the wife's equitable *chattels real*, the effect of marriage being, as a general rule, the same upon equitable as upon legal interests, it follows, that as the husband may assign the *chattels real* of the wife at *law*, so he may assign her *trust* of a term in equity (*b*), though it be [reversionary (*c*) or] merely a contingent interest (*d*); and without the concurrence of

(*d*) *Lachton v. Adams*, 14 Sim. 594.

(*e*) *Story v. Tonge*, 7 Beav. 91; and see *Box v. Box*, 2 Conn. & Laws. 605.

(*f*) 2 Ph. 731.

(*g*) *Box v. Jackson*, 6 Ir. Eq. Rep. 174; *Williams v. Mayne*, 1 I. R. Eq. 519; [*Re Butler's Trusts*, 3 I. R. Eq. 138; 3 L. R. Ir. 89.]

(*h*) See *Dudley v. Tanner*, W. N. 1873, p. 75.

[(*a*) *Re Butler's Trusts*, 3 L. R. Ir. 89.]

(*b*) *Roupe v. Atkinson*, Bunb. 162; *Mitford v. Mitford*, 9 Ves. 99, per Sir W. Grant; *Re Carr's Trusts*, 12 L. R.

Eq. 609; *Packer v. Wyndham*, Pr. Ch. 418, 419, per Lord Cowper; *Franco v. Franco*, 4 Ves. \*528, per Lord Alvanley; *Bullock v. Knight*, 1 Ch. Ca. 266, per Lord Nottingham; *Sanders v. Page*, 3 Ch. Rep. 223, per Cur.; *Macaulay v. Philips*, 4 Ves. 19, per Lord Alvanley; *Wikes' Case*, Lane, 54, per Barons Snig and Altham; S. C. Roll. Ab. 343; *Jewson v. Moulson*, 2 Atk. 421, per Lord Hardwicke; *Inclendon v. Northcote*, 3 Atk. 435, per eundem; *Clark v. Burgh*, 2 Coll. 221; [*Re Bellamy*, 25 Ch. D. 620.]

[(*c*) *Re Bellamy*, 25 Ch. D. 620.]

(*d*) *Donne v. Hart*, 2 R. & M. 360.

either the wife or the trustee, and without consideration. And this doctrine is not interfered with by the case of *Purdew v. Jackson* (*e*); for a trust of chattels real is not a *chose en action*, but a present interest—an estate in possession (*f*). If, however, the equitable interest in the chattel be such that it could not by possibility vest in the wife during the coverture, then, inasmuch as the legal interest of a similar kind could not be disposed of by the husband, he cannot dispose of the equitable interest (*g*). If a husband mortgage his wife's chattel real, and the wife survives, she has the equity of redemption, though the mortgage deed recited falsely that the husband was absolutely entitled (*h*). If the equitable interest in the chattel be settled to the *separate use* of the *feme covert*, and she does not dispose of it, it survives to the husband (*i*).

11. **Whether wife entitled to settlement out of equitable chattels real.**—Whether the doctrine regarding the wife's *equity to a settlement* extends to the *equitable chattels real* of the wife, has been much doubted. It was held in one case, by Vice-Chancellor Wigram, as a result of the principles laid down by Lord Cottenham, in *Sturgis v. Champneys* (*j*), that even where the husband could dispose of the equitable chattel, the wife was entitled to a provision out of the equitable interest, as against the assignee of the husband for valuable consideration (*k*). The opinion of the [\*747] Vice-Chancellor \*himself was the other way, but he considered himself bound by the authority of the Chancellor in the case referred to.

12. **Result of decisions.**—The result of these decisions is remarkable. Thus, a mortgage by the husband of the wife's *legal* term bars her of all right, except in the equity of redemption (*a*); while under a similar mortgage of the *equi-*

(*e*) 1 Russ. 1.

(*f*) See *Mitford v. Mitford*, 9 Ves. 98, 99; *Holland's Case*, Style, 21; *Burgess v. Wheate*, 1 Eden, 223, 224; *Box v. Jackson*, 1 Drury, 84.

(*g*) *Duberly v. Day*, 16 Beav. 33.

(*h*) *M'Cullagh v. Littledale*, 9 I. R. Eq. 465.

(*i*) *Archer v. Lavender*, 9 I. R. Eq. 220.

(*j*) 5 M. & Cr. 77; and see *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(*k*) *Hanson v. Keating*, 4 Hare, 1.

(*a*) *Hill v. Edmonds*, 5 De G. & Sm. 603; *Clark v. Cook*, 3 De G. & Sm. 333.

*table* term, she would have an equity to a settlement as against the mortgagee. Again, the *legal* reversionary term of the wife, provided it be such as may by possibility vest during the coverture, is capable of absolute assignment by the husband; and the wife has no right by survivorship, such as exists in the case of her *chose en action*, while as respects the assignment of a similar *equitable* interest there would be an equity to a settlement in the wife. The difficulties of applying the doctrine of the *wife's equity* to the case of chattels real, must, undoubtedly, prove considerable; but it can be hardly expected that the steps, of which Lord Cottenham in *Sturgis v. Champneys* took the first, will now be retraced.

13. **Effect of getting in legal estate of wife's equitable term.**— It is conceived that if the husband, or the assignee from him of the wife's *equitable term*, can procure an assignment of the *legal estate* from the trustee, the wife's equity to a settlement is at an end; but the point is not touched by authority.

14. **Arrears of income.**— The equitable interest of the wife in a *chattel real* is not a *chose en action*, but an estate, and therefore, although, according to the principles laid down in *Sturgis v. Champneys*, the wife can claim an equity to a settlement out of such estate *prospectively*, yet until such claim is established, the right of the husband prevails. All arrears of income therefore which may have occurred before the claim, whether from an equitable estate in fee or for life, or a term of years, will be exempt from the equity to a settlement, and belong to the husband or his assignee (*b*).

15. **Estate by *elegit* in trust for a *feme covert*.**— If a judgment be acknowledged to A. in trust for a *feme sole*, and she marries, and the conusee of the judgment sues out an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the *extended interest*, as he might have assigned the trust of a term certain (*c*); and the law is the same where the *feme* is put in

(*b*) *Re Carr's Trust*, 12 L. R. Eq. W. 201, per Lord King. But this was before the case of *Purdey v.* 609.

(*c*) *Lord Carteret v. Paschal*, 3 P. Jackson, 1 Russ. 1.

possession of lands by a decree of a court of equity until a certain sum is raised by way of *equitable elegit* (*d*). But a *mere judgment*, recovered by the wife before the [\*748] \*coverture, is clearly a *chose en action*, and as such cannot be disposed of by the husband as against the wife surviving (*a*).

16. **Mortgage term in trust for a feme covert.**— And it has been held that a *mortgage term* in trust for the wife (*b*), or a *term in trustees for raising a portion* for her (*c*), may be assigned by the husband, so as to carry the beneficial interest. But in these cases a doubt arises whether the debt or portion may not be held to be the principal thing; and as the doctrine that a *chose en action* of the wife is not disposable by the husband is of far more recent date than the decisions referred to, the question cannot be considered as settled. The cases in which it has been held under the order and disposition clause in bankruptcy, that the land draws with it the debt, so as to exclude the operation of the clause, tend to support the old authorities (*d*), but they are hardly conclusive, and a modern decision of Sir John Romilly, M. R., which was affirmed on appeal, has shaken the authority of the older cases (*e*).

17. **Wife's equitable interest in lands of freehold or inheritance.**— The case of the wife's equitable estate in lands of *freehold* or *inheritance*, presents in the main the same general similarity to the case of her *legal* estate in like lands, as has been noticed in respect of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the legal interest, convey an estate for the *joint lives* of himself and his wife (*f*), or for his *own life after issue born*. So he and his wife conjointly can, by deed acknowledged by

(*d*) S. C. Ib. 179.

(*a*) Fitzgerald v. Fitzgerald, 8 C. B. 611.

(*b*) Bates v. Dandy, 2 Atk. 207; Packer v. Wyndham, Pr. Ch. 412, see 418.

(*c*) Walter v. Saunders, 1 Eq. Ca. Ab. 58; Incledon v. Northcote, 3 Atk. 430, see 435; and see Mitford v. Mit-

ford, 9 Ves. 99; Hore v. Becher, 12 Sim. 465.

(*d*) Jones v. Gibbons, 9 Ves. 407; and see Rees v. Keith, 11 Sim. 388.

(*e*) Duncombe v. Greenacre, 28 Beav. 472, 2 De G. F. & J. 509.

(*f*) As to the legal estate, see Robertson v. Norris, 11 Q. B. 916.

the latter under the Fines and Recoveries Act, dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed inrolled in Chancery; [and can dispose of an equitable reversionary interest in freehold property, which has been purchased by trustees in breach of trust and is still personal estate in equity (*g*).]

18. But according to Lord Cottenham's decision in *Sturgis v. Champneys* (*h*), the acts of the *husband alone* cannot affect the wife's equity to a settlement, where the interest of the wife can only be recovered through the medium of a *Court of equity* (*i*).

\* The propriety of the decision in this case was [\*749] questioned by the late Lord Westbury (*a*). But after so long a lapse of time it is not likely that the principle of it will be shaken. It has accordingly been held that as regards an equitable *freehold*, that is, an estate to which a *feme covert* is entitled in equity *for her own life*, she may proceed actively, and institute a suit against the trustee of her bankrupt husband for a settlement of it upon herself (*b*). But she has no such equity against a *purchaser, for value*, from her husband, who at the time was *supporting her* (*c*). In short, the principles which govern the wife's equitable interest for *life in realty*, are the same as those which regulate the *like interest* of the wife in *personalty* (*d*).

19. *Equitable estates in fee simple or fee tail.*—As to the case of an *equitable fee simple* or *fee tail* to which a *feme covert* is entitled, a distinction must be borne in mind between

[(*g*) *Re Durrant and Stoner*, 18 Ch. D. 106.]

(*h*) 5 M. & Cr. 97.

(*i*) At law a husband during the coverture and before issue born has the estate for the joint lives of himself and his wife, but in her right only; and even after issue born he has no estate in his own right, for curtesy does not commence until the death of the wife, *Jones v. Davies*, 8 Jur. N. S. 592. Until the late Act, 8 & 9 Vict. c. 106, s. 6, a husband could not during the coverture have passed

the legal estate for his own life, except by a conveyance which carried the fee tortiously, as by a feoffment; Co. Lit. 30, a.

(*a*) See *Gleaves v. Paine*, 1 De G. J. & S. 87.

(*b*) *Barnes v. Robinson*, 1 New Rep. 257; *Sturgis v. Champneys*, 5 M. & Cr. 97.

(*c*) *Tidd v. Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Stanton v. Hall*, 2 R. & M. 175.

(*d*) See *ante*, 744.

the husband's powers over a wife's *personal*, and over her *real* estate. The husband can get possession of the absolute interest of the former and make away with it; and therefore the Court settles the corpus or a competent part of it on the wife and her children; but as to realty, the husband has no power over the corpus, but can dispose only of the interest during the joint lives, or if there be issue, for his own life; and as this limited interest is all that the husband or those claiming under him can deal with, and the husband has the *curtesy* in his *own right*, it is only the interest during the *joint lives* that requires to be settled. As to any ulterior interest, the Court has properly nothing to do with it. If the wife be tenant in fee, — why should the heir be disinherited in favour of the children? and if the wife be tenant in tail, why should the issue in tail and remainderman be defeated? "In the case of the wife's real estate," observed V. C. Wood, "she wants no protection out of the *corpus* of that estate, for she cannot be deprived of it without her own concurrence, which the law requires to be given in such a manner as will protect her from her husband" (*e*). Where, therefore, the wife is tenant in fee or in tail in equity, the claim [\*750] of the wife stands on the same footing as \* where she is tenant for life in equity, and has been so dealt with accordingly (*a*).

[20. **Real estate held upon trust for sale.** — Where real estate is held upon trust for sale and to pay the proceeds to a married woman, the husband can, after the land has actually

(*e*) *Durham v. Crackles*, 8 Jur. N. S. 1175.

(*a*) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Durham v. Crackles*, 8 Jur. N. S. 1174. L. J. Knight Bruce on one occasion observed, "We do not touch the husband's possible tenancy by the curtesy in the real estate of which we direct a settlement, and, so far as I am concerned, for this reason, that in my opinion we have not jurisdiction to order any settlement which shall interfere with it;" *Smith v. Matthews*,

3 De G. F. & J. 153. From which it might be inferred that a settlement subject to the curtesy might extend beyond the joint lives; but if the Court under special circumstances, has ever directed a settlement of the equitable fee on the wife and children, the settlement as regards the children must be viewed as the voluntary settlement of the wife, and not the judicial act of the Court. See *Gleaves v. Paine*, 1 De G. J. & S. 87; *Smith v. Matthews*, 3 De G. F. & J. 139.

been sold, give a good discharge for the purchase-money, but until the sale the husband cannot by any act of his bar the wife's right (*b*).

21. **Fund in Court representing realty.**—Where a fund in Court represents realty to which a married woman is absolutely entitled, she may elect to take it as personalty, and, upon her being separately examined and consenting, it may be paid out to her husband without any deed being executed (*c*).

22. **Alimony.**—A married woman, to whom permanent alimony has been allowed on a judicial separation from her husband, cannot alienate it, as it is not in the nature of property but is simply an allowance to provide for the daily maintenance of the wife and is by its very nature inalienable (*d*).]

23. **Existence of an outstanding term.**—The mere circumstance of the existence of a *jointure-term*, preceding the estate of a *feme covert* tenant in tail in possession subject to the term, sufficiently renders the wife's estate equitable to entitle her to a settlement during the joint lives in a suit instituted by her (*e*). And, indeed, wherever a plaintiff is obliged to come into a *Court of equity* he must submit to do *equity*, though the estate of the wife is *legal*, as if a husband make an equitable mortgage of land of which his wife is seised at law, the mortgagee cannot obtain a legal mortgage or enforce his security without providing for the wife, if deserted or not maintained at the time of the equitable mortgage (*f*).

24. **Getting in the legal estate.**—The effect of the husband, or the *husband's assignee*, procuring a conveyance of the *legal estate* so as to clothe his equitable \*interest [\*751] therewith, must be the same as in the case of an equitable term of years before adverted to (*a*).

[(*b*) *Franks v. Bollans*, 3 L. R. Ch. App. 717.]

(*e*) *Wortham v. Pemberton*, 1 De G. & Sm. 644.

[(*c*) *Standerling v. Hall*, 11 Ch. D. 652; *Re Robin's Estate*, 27 W. R. 706.]

(*f*) *Durham v. Crackles*, 8 Jur. N. S. 1174.

(*a*) See *ante*, p. 747.

[(*d*) *Re Robinson*, 27 Ch. D. 160.]



[(B.) **Married Women's Property Act, 1882.** — Of the modifications introduced by the Married Women's Property Act, 1882 (*b*).

1. The 2d sect. of the Act enables every woman married *after* the commencement of the Act (1st January, 1883) to hold as her separate property and to dispose of by will, or otherwise, all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

And the 5th sect. enables every woman married *before* the commencement of the Act to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act, including any wages, earnings, money and property, so gained or acquired by her as aforesaid (*c*).

2. The result of this enactment is that as to women married since the 31st December, 1882, and also as to property accruing after that date to women married before that date, the rights of the husband, at any rate during the life of the wife, are entirely excluded, and the wife is enabled to deal with, bind and dispose of her property, whether real or personal, in the same manner as if she were a *feme sole*. The cases relating to the rights of the husband in the wife's property, and to the equity to a settlement of the wife, and to the wife's right by survivorship have, therefore, no bearing, where the marriage has taken place or the property has been acquired since the 31st December, 1882.

3. **Property falling into possession after the commencement of the Act.** — It will be observed that the 5th sect. relates to the *accruer* of the married woman's *title*, which must take

[*b*) 45 & 46 Vict. c. 75.]

the earnings arise, see *Ashworth v.*

[(*c*) As to the protection extended to the trade or business from which

*Outram*, 5 Ch. D. 923, *post* 788, note (*c*).]

place after the commencement of the Act to bring the case within the section, and the section seems not to deal with the case of a change in the title such as occurs when a contingent interest becomes vested or a reversionary interest falls into possession. The contrary view was however taken by Chitty, J., in a case where the question was whether the separate examination of the married woman could be dispensed with (*d*). \* The case appears to have been [\*752] unopposed and can hardly be regarded as a final decision on the point and although it has since been followed (*a*),<sup>1</sup> the judges in following it have withheld any expression of their own opinions upon the point, and it is submitted that the true construction of the section is to confine it to the case where the original title has accrued since the commencement of the Act. The Act ought not to be construed so as to deprive husbands married before the Act of an interest which had already accrued to them when the Act was passed.

[4. **Rights of husband in property not disposed of by wife.** — Whether the rights of the husband after the wife's death in such parts of her property as have not been disposed of by her are affected by the Act, is a question upon which there has been some difference of opinion founded on the use of the words "*feme sole*" in the 1st sect., but it will be observed that that section only gives to a married woman certain *specific* rights, or subjects her to certain *specific* liabilities "*as if she were a feme sole*," such as "*to acquire, hold and dispose of property*," "*to contract*," "*to sue and be sued*," or "*to be made a bankrupt*," and by implication excludes the construction that she is for all purposes to be treated as a *feme sole*. It is conceived, therefore, that the true construction of the Act is that the rights in a married woman's property after her death, so far as such

[*(d)* Baynton v. Collins, 27 Ch. D. 604.]

[*(a)* *Re Thompson and Curzon*, W. N. 1885, p. 60; *Re Hughes' Trusts*, W. N. 1885, p. 62; *Re Thompson and Curzon*, 29 Ch. D. 177. But see the

subsequent cases of *Re Tucker*, 54 L. J. Ch. 874, and *Re Adams' Trusts*, 54 L. J. Ch. 878, where Pearson, J., and Kay, J., declined after argument to follow the former cases.]

<sup>1</sup> It is now overruled. *Reid v. Reid*, 31 Ch. Div. 402, 1886.

property is not disposed of or bound by her in her lifetime, are unaffected by the Act, and that the husband will be entitled, as to personal chattels and cash by the marital right, and as to *choses en action* on taking out administration to her estate under 29 Car. II, c. 3, s. 24, to retain her undisposed of personal estate to the exclusion of her next of kin (*b*). It is true that the 23d sect. provides that "for the purposes of the Act the legal personal representative of any married woman is in respect of her separate estate to have the same rights and liabilities" as she would have if living (*c*), but these rights cannot include a right of disposition [*\*753*] \*so as to affect the beneficial interest, and refer only, as is conceived, to rights for the protection or benefit of the separate estate.

**Extent of Act.**—The Act has no application where the marriage took place and the property was acquired before the commencement of the Act, 1st January, 1883, and in such cases the old law applies (*a*).

Where a testator dies after the Act, but his will was executed before the passing of the Act, the will must be construed according to the law in force when it was executed, but the interest of a married woman under the will will be governed by the Act. Thus where a residuary estate was given by such a will to A. and B. and C., his wife, under which gift before the Act, A. would have taken one moiety, and B. and C. the other moiety as if they had been

[(*b*) The contrary opinion is intimated in *Wolstenholme & Turner's Conveyancing Acts*, 3d ed. p. 8, and the case of *In the Goods of Worman*, 1 Sw. & Tr. 513, is cited in support of it, but that was the case of an application for administration to the estate of a married woman who had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, by reason of the husband's desertion, and the grant of administration was expressly limited to "such property as the deceased acquired since her husband's desertion," and inasmuch as, by the joint operation of the 21st and 25th sec-

tions of the Act, the property to which administration was granted went on her decease intestate "as the same would have gone if her husband had then been dead," the case is no authority in construing the Married Women's Property Act, 1882, which contains no similar words.]

[(*c*) The section is ungrammatical but this is apparently what is intended. The words "have or be subject to" seem to have been omitted from the last line.]

[(*a*) *Re Harris' Settled Estates*, 28 Ch. D. 171.]

one person, it was held by the Court of Appeal, reversing Chitty, J., that A. was still entitled to one moiety, but the other moiety belonged to B. and C. as joint tenants as if she were unmarried. But the Court of Appeal expressed no opinion as to what share A. would have taken if the will had been executed after the passing of the Act (*b*).

[Whether will of married woman passes property acquired after the death of her husband. — A question arises whether under the Act a married woman can during her coverture dispose by will of property which she may acquire after the death of her husband and it has been held by Pearson, J., that she has no power to do so (*c*). This seems a somewhat narrow construction of the Act as the 2d and 5th sects. in terms apply to all real and personal property acquired by a married woman *after her marriage*, where married after the Act, or *after the commencement of the Act* where previously married, and authorise her to dispose of such property by will as her separate property (*d*).

If it was intended that the power should be confined to property acquired “during the coverture” these words should have been used in the 2d sect. instead of “after her marriage,” and in the 5th sect. instead of “after the commencement of the Act.”]

*Secondly.* — Of the separate use.<sup>1</sup>

1. **Trusts for separate use of a feme covert.** — [Independently of the recent enactments affecting the property of

[(*b*) *Re March*, 27 Ch. D. 166; reversing S. C. 24 Ch. D. 222.]

[(*c*) *Re Price*, 28 Ch. D. 709.]

[(*d*) It is observable that in the 2d sect. the words are “to have and to hold as her separate property and to dispose of in manner aforesaid”

(i.e. by will or otherwise), while in the 5th sect. they are “to have and to hold and to dispose of in manner aforesaid as her separate property,” but no distinction can be founded upon this.]

<sup>1</sup> *Separate estate.* — Property may be settled upon a *feme covert* free from the control or interference of the husband; *Fellows v. Tann*, 9 Ala. 1003; *Robert v. West*, 15 Ga. 123; *Beaufort v. Collier*, 6 Humph. 487; and it is not even necessary that there should be an express trustee, the husband, if necessary, acting as a trustee; *Wilkinson v. Cheatham*, 45 Ala. 337; *Richardson v. Stodder*, 100 Mass. 528; *Wade v. Fisher*, 9 Rich. Eq. 362; *Shirley v. Shirley*, 9 Paige, 364; *Hamilton v. Bishop*, 8 Yerg. 33; *Long v. White*, 5 J. J. Marsh, 226; *Barron v. Barron*, 24 Vt. 375. The property must be clearly and unequivocally given to the wife for her sole use, to bar the husband from his

married women] the principle at *common law* is that, as the husband undertakes the debts and liabilities of the [\*754] wife, he is entitled \*absolutely or partially, according to the circumstances of the case, to the enjoyment of her property; but in *equity* a *feme* is allowed to

rights; *Hale v. Stone*, 14 Ala. 803; *Ashcraft v. Little*, 4 Ired. Eq. 236; *Rudisell v. Watson*, 2 Dev. Eq. 430; *Boal v. Morgner*, 46 Mo. 48; *Somers v. Craig*, 9 Humph. 467; *Nixon v. Rose*, 12 Gratt. 425; but no exact form of words is required; *Nightingale v. Hidden*, 7 R. I. 115. The following expressions are sufficient to bar the husband; to the wife "exclusively"; *Gould v. Hill*, 18 Ala. 84; "to be hers and hers only"; *Ozley v. Ikelheimer*, 26 Ala. 332; *Ellis v. Woods*, 9 Rich. Eq. 19; "for her sole and separate use"; *Petty v. Boothe*, 19 Ala. 633; "to her own use and benefit independent of any other person"; *Williams v. Maull*, 20 Ala. 721; *Ashcraft v. Little*, 4 Ired. Eq. 236; "solely for her own use"; *Jarvis v. Prentice*, 19 Conn. 273; *Fisher v. Filbert*, 6 Barr, 61; *Goodrum v. Goodrum*, 8 Ired. Eq. 313; "for her own and her family's use during her natural life"; *Heck v. Clippenger*, 5 Barr, 385; "for her support"; *Markley v. Singletary*, 11 Rich. Eq. 393; "for the use and benefit of the wife and her heirs"; *Good v. Harris*, 2 Ired. Eq. 630; "to be at her own disposal in true faith to her and her heirs forever"; *Bridges v. Wood*, 4 Dana, 610; "to her during her life, afterwards to her children"; *Hamilton v. Bishop*, 8 Yerg. 33; *Tyson's App.* 10 Barr, 221. Others have been held not sufficiently clear and definite; "not to be liable for husband's debts"; *Gillespie v. Burleson*, 28 Ala. 551; but see *Young v. Young*, 3 Jones, Eq. 216; "to her use"; *Tennant v. Stoney*, 1 Rich. Eq. 222; "for the joint use of husband and wife"; *Geyer v. Bank*, 21 Ala. 414; "to her during her life, after her death to her issue"; *Bryan v. Duncan*, 11 Ga. 67; "the gift not to extend to any other person"; *Ashcraft v. Little*, 4 Ired. Eq. 236; "to her heirs and assigns, for her or their own sole use"; *Houston v. Embry*, 1 Sneed, 480. A mere conveyance to wife and her heirs; *Shirley v. Shirley*, 9 Paige, 364; *Fitch v. Ayer*, 2 Conn. 143; nor a gift to a trustee; *Pollard v. Merrill*, 15 Ala. 170; *Mayberry v. Neely*, 5 Humph. 339; in general, the words must clearly shut out the rights of the husband; *Good v. Harris*, 2 Ired. Eq. 630; *Jasper v. Howard*, 12 Ala. 652. If property is conveyed to an unmarried woman, to her sole and separate use, the effect of the conveyance is no different from a general conveyance, until she marries, and she holds it free from any control of her husband; *Blackstone Bank v. Davis*, 21 Pick. 42; *Hamersley v. Smith*, 4 Whart. 126; *Hallett v. Thompson*, 5 Paige, 583; *Snyder's App.* 92 Pa. St. 504; *Ogden's App.* 70 Pa. St. 501; *Wallace v. Coston*, 9 Wall. 137; *Talbot v. Calvert*, 12 Harris, 328. Property conveyed properly to the sole and separate use of a woman, is absolute, and she can deal with it as she chooses; *Parker v. Converse*, 5 Gray, 336; *Williams's App.* 83 Pa. St. 377. And such a conveyance bars the rights of all future husbands, as well as those of the present or first one; *Roberts v. West*, 15 Ga. 123; but see *Waters v. Tazewell*, 9 Md. 291; *Shirley v. Shirley*, 9 Paige, 364; as to legal proceedings relating to separate estate, see *Ferguson v. Smith*, 2 Johns. Ch. 139; *Wilson v. Wilson*, 6 Ired. Eq. 236; *Sherman v. Burnham*, 6 Barb. 403; *Grant v. Van Schoonhoven*, 9 Paige, 255. The laws relating to separate property vary in the different states, and the different statutory provisions relating thereto may lead to entirely different results.

contract with the husband before marriage, for the exclusive enjoyment of any specific property (a); or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and *quisque renunciare potest juri pro se instituto*; but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture, appears a more questionable doctrine, though it may be said, that even in that case, there was no violation of the marital rights, for the property never vested in the *feme* herself, and the donor might limit any estate which the law did not refuse to recognise. The Court has also permitted the further anomaly of a restriction upon the *feme's anticipation* (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an appendage to the separate use for the purpose of more effectually excluding the influence of the husband. If the wife were not debarred from anticipating the proceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal.

2. Not necessary that there should be an express trustee.—

At the first introduction of the settlement to the separate use it was doubted, whether, to accomplish the object, the interposition of an *express trustee* was not necessary (b), but it was afterwards determined that this precaution might be dispensed with, for, rather than the intention should be disappointed, the husband himself should be construed a trustee for the wife (c). But [as to cases not falling within the

(a) See *Parkes v. White*, 11 Ves. 228. *v. Budder*, Bunb. 187; *Prichard v. Ames*, T. & R. 222; *Newlands v. Paynter*, 10 Sim. 377; 4 M. & Cr. 408;

(b) *Harvey v. Harvey*, 1 P. W. 125; *Burton v. Pierpont*, 2 P. W. 78. *Turnley v. Kelly*, Wallis's Rep. by

(c) *Bennet v. Davis*, 2 P. W. 316; *Lyne*, 311; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

*Parker v. Brooke*, 9 Ves. 583; *Rolfe*

recent statute] whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, he has *primâ facie* a right to her property (*d*); but, provided the meaning be clear, \* the Court will execute the intention, though the settlor may not have expressed himself in technical language (*a*).

[The husband may himself during the coverture give any specific property to the wife for her separate use, without the intervention of a trustee (*b*); and if a husband permit his wife to carry on a business for her own benefit, independently of him, it becomes her separate property, and the husband becomes so far as is necessary a trustee of everything employed in the business for the wife (*c*).

In the absence of proof of an unequivocal or final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement, treat the property as belonging to her for her separate use (*d*).

An allowance made under an order in lunacy to the wife of a lunatic living apart from her husband for her separate maintenance belongs to her for her separate use (*e*).

3. [Married Women's Property Act, 1882. — Now by the Married Women's Property Act, 1882, a married woman can acquire, hold, and dispose of property as her separate estate without the intervention of any trustee (*f*); and under the 2d and 5th sections of the Act all property acquired by any

[(*d*) *Ex parte* Ray, Mad. 207, per Sir T. Plumer; *Wills v. Sayers*, 4 Mad. 409, per *eundem*; *Massey v. Parker*, 2 M. & K. 181, per Sir C. Pepys; *Kensington v. Dollond*, 2 M. & K. 188, per Sir J. Leach; *Moore v. Morris*, 4 Drew. 37, per V. C. Kindersley; *Fitzgibbon v. Pike*, 6 L. R. Ir. 487.]

(*a*) *Darley v. Darley*, 3 Atk. 399, per Lord Hardwicke; *Stanton v. Hall*, 2 R. & M. 180, per Lord Brougham; [and see *Re Peacock's Trusts*, 10 Ch. D. 490.]

[(*b*) *Lady Cowper's case*, cited in *Graham v. Londonderry*, 3 Atk. 393; *Lucas v. Lucas*, 1 Atk. 270; *Walter v. Hodge*, 2 Sw. 92; *Ex parte Whitehead*, 14 Q. B. D. 419.]

[(*c*) *Ashworth v. Outram*, 5 Ch. D. 923; *Ex parte Whitehead*, 14 Q. B. D. 419; and see *Slanning v. Style*, 3 P. W. 334; *Calmady v. Calmady*, cited in *Slanning v. Style*, *Ib.* 338.]

[(*d*) *Re Whittaker*, 21 Ch. D. 657.]

[(*e*) In the Goods of *Tharp*, 3 P. D. 76.]

[(*f*) 45 & 46 Vict. c. 75, s. 1.]

married woman since the 31st December, 1882, irrespective of the date of her marriage, and also all property belonging to any woman married since that date are made her separate estate.

It is conceived that subject to the enlarged rights and liabilities introduced by the Act, the principles, which regulate the administration of property held for the separate use, will apply equally to any property which by virtue of the late Act belongs to a married woman as her separate estate. Thus, while the old law has to some extent ceased to be applicable to cases governed by the late Act, it will frequently be necessary to refer to it even in connection with property bound by that Act; and as to property acquired before the 1st January, 1883, by women married before that date the law remains unaffected by the Act.

4. **What words will create a trust for separate use.**—In cases not falling within the recent Act] the marital claims \* will be defeated if the gift be to the wife [\*756] for her “separate use” (a), or “sole and separate use” (b), or “solely for her own use” (c), (which is construed as separate use), or “solely and entirely for her own use and benefit” (d), [or “for her sole use and disposal” (e), or “for her sole and absolute use and disposal” (f),] or for

(a) *Massy v. Rowen*, 4 L. R. H. L. 294, 299, and 300, *per Cur.*

(b) *Parker v. Brooke*, 9 Ves. 583; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(c) *Re Tarsey's Trust*, 1 L. R. Eq. 561; *Adamson v. Armitage*, 19 Ves. 416; *G. Coop.* 283; *Ex parte Ray*, 1 Mad. 199; *Ex parte Killick*, 3 Mont. D. & De G. 480; *Davis v. Prout*, 7 Bear. 288; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; *Lindsell v. Thacker*, 12 Sim. 178 (the marginal note in the last case is altogether erroneous); and see *Massy v. Parker*, 2 M. & K. 181; — *v. Lyne*, Younge, 562; but as to the latter case, see *Tullett v. Armstrong*, 4 M. & Cr. 403; and see *Gilbert v. Lewis*, 1 De G. J. & S. 39; *Lewis v. Matthews*, 2 L. R. Eq. 177. The word “sole” by itself is a word of equivocal and ambiguous meaning,

and takes its color from the context. It has been held, in Ireland, in a recent case, affirmed on appeal by the House of Lords, not to create *per se* a separate use in a gift to a legatee, where at the date of the will the legatee was a *feme sole*; *Massy v. Hayes*, 1 Ir. Rep. Eq. 110. S. C. *nom Massy v. Rowen*, 4 L. R. H. L. 288. But otherwise where the legatee was known to the testator to be a married woman; *Hartford v. Power*, 2 Ir. Rep. Eq. 204; [*Farrow v. Smith*, W. N. 1877, p. 21; *Re Amies' Estate*, W. N. 1880, p. 16.]

(d) *Inglefield v. Coghlan*, 2 Coll. 247.

[(e) *Bland v. Dawes*, 17 Ch. D. 794.]

[(f) *Baker v. Ker*, 11 L. R. Ir. 3.]



"her livelihood" (*g*), or "that she may receive and enjoy the profits" (*h*), or "to be at her disposal" (*i*), or "to be by her laid out in what she shall think fit" (*j*), or "for her own use, independent of her husband" (*k*), or "not subject to his control" (*l*), or "for her own use and benefit, independent of any *other person*" (*m*), or "to receive the rents from the tenants while she lives, whether married or single," with a direction that no sale or mortgage should be made during her life (*n*): for such expressions as these are considered inconsistent with the notion of any interference on the part of the husband. So, if the gift be accompanied with such expressions as "her receipt to be a sufficient discharge" (*o*), or "to be delivered to her on demand" (*p*); for in these cases the check put upon the husband's legal right to receive could only have been with the intention of giving the [\*757] wife a particular benefit. So, if the gift be \* to the husband should he be living with his wife, but if separate then half to the husband and the other half to the wife "absolutely," for the context shows that by absolutely is meant for the separate use (*a*).

[Where trustees have a discretion to "*pay, apply, and dispose of*" the income of a trust fund for the maintenance and support of a married woman, they may pay the income to her for her *separate use* (*b*).]

5. **What words not sufficient.** — But if the trust be merely "to pay to her," or "to her and her assigns" (*c*), or the gift

(*g*) *Darley v. Darley*, 3 Atk. 390, per Lord Hardwicke; and see *Cape v. Cape*, 2 Y. & C. 543; *Ex parte Ray*, 1 Mad. 208; but see *Lee v. Prieaux*, 3 B. C. C. 383; *Wardle v. Claxton*, 9 Sim. 524, *id qu.*

(*h*) *Tyrrell v. Hope*, 2 Atk. 558. But this was in marriage articles, and under special circumstances, and must not be taken to establish any general rule.

(*i*) *Prichard v. Ames*, T. & R. 222; *Kirk v. Paulin*, 7 Vin. 96. *Secus* probably if these words had occurred in a gift to a *feme sole*.

(*j*) *Atcherley v. Vernon*, 10 Mod. 531.

(*k*) *Wagstaff v. Smith*, 9 Ves. 520.

(*l*) *Bain v. Lescher*, 11 Sim. 397.

(*m*) *Margetts v. Barringer*, 7 Sim. 482.

(*n*) *Goulder v. Camm*, 6 Jur. N. S. 113; 1 De G. F. & J. 146.

(*o*) *Lee v. Prieaux*, 3 B. C. C. 381; *Woodman v. Horsley*, cited *Ib.* 383; *Cooper v. Wells*, 11 Jur. N. S. 923; *Re Molyneux' Estate*, 6 I. R. Eq. 411; and see *Stanton v. Hall*, 2 R. & M. 180.

(*p*) *Dixon v. Olmius*, 2 Cox, 414.

(*a*) *Shewell v. Dwarria*, Johns. 172.

[*(b)* *Austin v. Austin*, 4 Ch. D. 233.]

(*c*) *Dakins v. Berisford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517.

be "to her use" (*d*), or "her own use" (*e*), or "her absolute use" (*f*), or "in trust only for her, her executors, administrators, and assigns" (*g*), or, "to her, her heirs, and assigns, for her or *their* own sole and absolute use" (*h*), or "to pay into her own proper hands for her own use" (*i*), or "to pay to her to be applied for the maintenance of herself and such child or children as the testator might happen to leave at his death" (*j*), there is no such unequivocal evidence of an intention to exclude the husband.

6. **Husband made a trustee for the wife.** — Where property was vested in the *husband jointly with another*, as general trustees of the will, upon trust (*inter alia*), for the wife, it was held not to be a gift to her separate use (*k*). Had the husband *alone* been appointed a trustee for the wife the decision might have been different (*l*).

[7. **Resumption of cohabitation.** — On the resumption of cohabitation in cases where there has been a judicial separation or a protection order, the property to which the wife is entitled when such cohabitation takes place belongs to her for her separate use (*m*).]

8. **Effect after marriage of the trust for separate use.** — If a *feme sole* marry without having disposed of the property settled to her separate use, the limitation to the separate use will on the marriage take effect. This doctrine is open to much observation \* upon principle (*a*), but [\*758] Lord Cottenham, in the cases of *Tullett v. Armstrong*,

(*d*) *Jacobs v. Amyatt*, 1 Mad. 376, n.; *Wills v. Sayers*, 4 Mad. 411; Anon. case, cited 7 Vin. 96.

(*e*) *Johnes v. Lockhart*, in note to *Lee v. Prieaux*, 3 B. C. C. 383, ed. by Belt (this case is erroneously cited as an authority to the contrary in *Lumb v. Milnes*, 5 Ves. 520, and *Ex parte Ray*, 1 Mad. 207); *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. C. C. 651; *Darcy v. Croft*, 9 Ir. Ch. Rep. 19.  
(*f*) *Rycroft v. Christy*, 3 Beav. 238.  
(*g*) *Spirett v. Willows*, 3 De G. J. & S. 293.

(*h*) *Lewis v. Mathews*, 2 L. R. Eq. 177.

(*i*) *Tyler v. Lake*, 2 R. & M. 183; *Kensington v. Dolland*, 2 M. & K. 184; *Blacklow v. Laws*, 2 Hare, 48; but see *Hartley v. Hurle*, 5 Ves. 545, *contra*.

(*j*) *Wardle v. Claxton*, 9 Sim. 524.

(*k*) *Ex parte Beilby*, 1 Gl. & J. 167; and see *Kensington v. Dollond*, 2 M. & K. 184.

(*l*) *Ex parte Beilby*, *ubi supra*; and see *Darley v. Darley*, 3 Atk. 399.

[(*m*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Re Emery's Trusts*, 50 L. T. N. S. 197; 32 W. R. 357.]

(*a*) Some observations upon this subject will be found in the 3d edit. p. 124.

and *Scarborough v. Borman* (b), anxious to prevent the consequences that would have flowed from a different decision, and not finding any other safe ground upon which to base his judgment, asserted an inherent power in the Court of Chancery to modify estates of its own creation, and in virtue of that jurisdiction established the validity of the separate use in case of the *feme's* marriage. If a fund be given to a *feme sole* for her separate use, without the intervention of a trustee, and she *sells out the fund and invests it in another form, and then marries*, the separate use has been destroyed, and she is regarded as the owner of the new property in the ordinary way (c).

9. **Effect of separate use on second marriage.**—If property be settled, whether by deed or will, to the separate use of a *feme*, and the separate use was meant to be confined to a *particular marriage*, and the husband dies and the widow marries again, the second husband will not be excluded [by the terms of the instrument] from his ordinary marital rights (d). The question simply is, What was the intention of the settlement or will? So, if real or personal estate be devised or bequeathed to A., a married woman, for her sole and separate use independent of her husband B., the separate use applies only to the existing and not to any future coverture (e); but if the exclusion of any *future husband* was also in contemplation, it will be carried into effect (f); and if the separate use do extend to any marriage, *present or future*, even the *arrears* due to the *feme* at the time of a subsequent marriage are protected from the after-taken husband (g).

(b) 4 M. & C. 377; and see *Newlands v. Paynter*, Ib. 408; *Russell v. Dickson*, 2 Dru. & War. 138; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(c) *Wright v. Wright*, 2 J. & H. 647.

(d) *Barton v. Briscoe*, Jac. 603; *Benson v. Benson*, 6 Sim. 126; *Knight v. Knight*, Ib. 121; *Jones v. Salter*, 2 R. & M. 208; *Moore v. Harris*, 4 Drew. 33; *Tudor v. Samyne*, 2 Vern. 270; *Sir E. Turner's case*, 1 Ch. Ca. 307; 1 Vern. 7. And see *Sanders v. Page*, 3 Ch. Rep. 224; *Pitt v. Hunt*, 1 Vern. 18; *Howard v. Hooker*, 2 Ch.

Rep. 81; *Edmonds v. Dennington*, cited *Carleton v. Earl of Dorset*, 2 Vern. 17. [But see the Married Women's Property Act, 1882, when the marriage takes place after the 31st Dec. 1882.]

(e) *Moore v. Harris*, 4 Drew. 33.

(f) *Ashton v. M'Dougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541; *Hawkes v. Hubback*, 11 L. R. Eq. 5; *Re Molyneux's Estate*, 6 I. R. Eq. 411.

(g) *Ashton v. M'Dougall*, 5 Beav. 56; and see *Newlands v. Paynter*, 4

And if a *jointure* or other interest to arise on the cesser of the present marriage be provided for a *feme covert*, it may be so limited as to enure to her separate use, and the inalienable during the *present coverture* (*h*).

\* [10. Where policies of assurance on the life of [\*759] the husband were settled for the benefit of the wife during her life for her separate use independently of any future husband with whom she might intermarry, it was held that the trust for the separate use did not arise until after the death of the first husband (*a*).]

11. **The wife's separate estate.**—Where property is settled to the *separate use*, the *feme covert*, unless her power of anticipation be restrained, may, without the concurrence of her trustees, unless the terms of the settlement require it (*b*), deal with the property directly and expressly, precisely in the same manner as if she were a *feme sole*. But, at the same time she will be protected against *fraud*, and, therefore, a settlement procured from her by her husband, upon a false representation, will be set aside (*c*).

12. **General rule.**—The general principle that governs the law of separate use was laid down by Lord Thurlow, and has been recognised by the highest authorities, viz., that “a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*” (*d*).

13. **Pleadings, contract, &c.**—A *feme covert*, therefore, as regards her separate property, *sues* separately as plaintiff [and since the Married Women's Property Act, 1882, without a next friend,<sup>1</sup>] and defends separately (*e*), and, if out

M. & Cr. 418; *England v. Downs*, 6 Beav. 269.

(*h*) *Re Molyneux's Estate*, 6 I. R. Eq. 411.

[(*a*) *King v. Lucas*, 23 Ch. D. 712.]

(*b*) *Grigby v. Cox*, 1 Ves. 518, per Lord Hardwicke; *Dowling v. Maguire*, Rep. t. Plunket, 19, per Lord Plunket.

(*c*) *Knight v. Knight*, 11 Jur. N. S. 618; and see *Sharpe v. Foy*, 4 L. R. Ch. App. 35.

(*d*) *Hulme v. Tenant*, 1 B. C. C. 20.

[(*e*) 45 & 46 Vict. c. 75, s. 1 (2): Rules of Supreme Court, Order 16, r. 16; and it is not material whether the contract, in respect of which the

<sup>1</sup> And she cannot be compelled to give security for costs where she sues as sole plaintiff, even though she may have no separate estate, and there is nothing upon which, if she fails, available execution can issue. *Jacob v. Isaac*, 30 Ch. Div. 418; but see *Re Robinson*, 27 Ch. Div. 160.

of the jurisdiction, may be *served with process* by leave of the Court (*f*), may present a *petition* [without a next friend] and without her husband (*g*), and will be bound by a *submission in her pleadings* (*h*), or by a *settlement of accounts* (*i*), or by a *contract* for \*purchase (*a*), or sale (*b*), and may *give away* the chattels settled to her separate use by manual delivery (*c*), or may *lend* money to her own husband (*d*), or may *demise* land settled to her separate use, when the lessee will be protected even at law under the equitable plea against intrusion by the holder of the legal estate (*e*), may *dispose of* her equitable interest in freehold estate settled to her separate use, *without acknowledgment* under the Fines and Recoveries Act (*f*), and will be bound as to her separate estate, if she agree verbally to accept a lease and takes possession (which is part performance) under the agreement (*g*), and may be made a *contributory* under a winding-up order (*h*), and her *declarations* may

action is, was entered into before or after the Act: *Gloucestershire Banking Company v. Philipps*, 12 Q. B. D. 533.]

(*f*) *Copperthwaite v. Tuite*, 13 Ir. Eq. Rep. 68; [Rules of Supreme Court, Order 11.]

[(*g*) 45 & 46 Vict. c. 75, s. 1, (2); *Re Outwin's Trusts*, 48 L. T. N. S. 410.]

(*h*) *Allen v. Papworth*, 1 Ves. 163; *Clerk v. Miller*, 2 Atk. 379; *Bailey v. Jackson*, C. P. Cooper's Rep. 1837-8, 495. Husband and wife put in a joint answer, and the wife admitted certain indentures to be in her possession and claimed the estates to which the indentures related to her separate use for her life. The plaintiff moved for production, but it was argued that the answer was the husband's and could not be read as an admission by the wife. However, the Court said though there was a logical difficulty, there was none in substance: that if the wife claimed the benefit of the separate use she must take it with its disadvantages; and ordered the production by the wife, and that the husband

should permit her to produce; *Cowdery v. Way*, V. C. K. B. 2d Nov. 1843. And see *Callow v. Howle*, 1 De G. & Sm. 531; *Beeching v. Morphew*, 8 Hare, 129; *Clive v. Carew*, 1 J. & H. 207.

(*i*) *Wilton v. Hill*, 25 L. J. N. S. Ch. 156.

(*a*) *Picard v. Hine*, 5 L. R. Ch. App. 274.

(*b*) *Davidson v. Gardner*, Sugd. Vend. & Purch. 891, 11th edit.; *Stead v. Nelson*, 2 Beav. 248; and see *Harries v. Mott*, 14 Beav. 169; *Vansittart v. Vansittart*, 4 K. & J. 70; *Milnes v. Busk*, 2 Ves. jun. 498.

(*c*) *Farrington v. Parker*, 4 L. R. Eq. 116.

(*d*) *Woodward v. Woodward*, 3 De G. J. & S. 672.

(*e*) *Allen v. Walker*, 5 L. R. Ex. 187.

(*f*) *Pride v. Budd*, 7 L. R. Ch. App. 64.

(*g*) *Gaston v. Frankum*, 2 De G. & Sm. 561; S. C. on appeal, 16 Jur. 507.

(*h*) *Re Leeds Banking Company*, 3 L. R. Eq. 781; and see *Butler v. Cumpston*, 7 L. R. Eq. 16.

be read in evidence against her (*i*), and she will be liable to an *attachment* for want of answer where she answers separately (*j*), and similarly for *disobeying the order* of the Court in a suit to which she is a party in respect of her separate estate (*k*), or her separate property may be ordered to be *sequestered* (*l*).

[14. Since the Married Women's Property Act, 1882, a married woman may by sect. 1, sub-sect. (2), sue or be sued, in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be made a party to any action or proceeding, and any damages or costs recovered by her in any *such* action or proceeding are her separate property; and any damages or costs recovered against her are payable out of her separate property and not otherwise (*m*). Under this section a married woman may sue without her husband in respect of a tort committed *before* the commencement of the Act, and the damages recovered belong to her as separate property (*n*), but it would seem that if the action were brought by the husband and wife jointly, the section, which applies only to "any *such* action," *i.e.*, an action brought by the wife as if \*she were a *feme sole*, will [\*761] not make the damages separate property (*a*). Under this section the right to bring an action in respect of any cause of action within section 7 of the Statute of Limitations, 21 Jas. I. c. 16, which accrued before the passing of the recent Act, commenced at the date of that Act coming into operation, and time runs against the married woman as from that date (*b*).

And every woman has in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if such

(*i*) *Peacock v. Monk*, 2 Ves. 193, *per* Lord Hardwicke.

(*j*) *Graham v. Fitch*, 2 De G. & Sm. 246; *Taylor v. Taylor*, 12 Beav. 271; *Home v. Patrick* (No. 1), 30 Beav. 405, in which case M. R. observed that if the *feme* had not obtained or concurred in the order to answer separately there might be a difficulty.

(*k*) *Ottway v. Wing*, 12 Sim. 90.

(*l*) *Keogh v. Cathcart*, 11 Ir. Eq. Rep. 280; and see cases cited *Ib*.

[*(m)* 45 & 46 Vict. c. 75, s. 1 (2).]

[*(n)* *Weldon v. Winslow*, 13 Q. B. D. 784; *Weldon v. De Bathe*, 14 Q. B. D. 339.]

[*(a)* *Ib.*]

[*(b)* *Weldon v. Neal*, 51 L. T. N. S. 289.]

property belonged to her as a *feme sole*; but no husband or wife is entitled to sue the other for a tort (*c*). Since the Married Women's Property Act, 1882, the sole undertaking of a married woman as to damages must be accepted where she as sole plaintiff is entitled to an injunction.<sup>1</sup>]

15. **General engagement of a feme covert in writing.**—The Courts have further determined [irrespective of the Married Women's Property Act, 1882,] that if, without any *direct* or *express* reference to her separate property, a *feme covert* who has property settled to her separate use (*d*), professes to bind herself by any *written* instrument, the implication of law is, that she meant to charge her separate estate; for, except with reference to that, the instrument was without meaning and nugatory. Thus, if a *feme covert* execute a *bond* (*e*), even to her husband (*f*), or join in a bond with another, even with her husband (*g*), or sign a *promissory note* (*h*), or *bill of exchange* (*i*), [or give a guarantee (*j*),] though she is not *personally* bound, yet her *separate estate*, if anticipation be not restrained (*k*), is liable. [But if, prior to the recent Act, her anticipation was restrained as to such separate estate as she was entitled to at the time of entering into the engage-

[*(c)* Sect. 12. An application by a husband against his wife for damages under an undertaking given by her on an injunction which was subsequently dissolved, is not in the nature of an action for tort within this section; *Hunt v. Hunt*, W. N. 1884, p. 243.]

[*(d)* As to the power of a married woman to contract under 3 & 4 W. 4, c. 74, in respect of her real estate generally, see *Crofts v. Middleton*, 2 K. & J. 194; 8 De G. M. & G. 192; *Pride v. Bubb*, 7 L. R. Ch. App. 64.

[*(e)* *Lillia v. Airey*, 1 Ves. jun. 277; *Norton v. Turvill*, 2 P. W. 144; *Peacock v. Monk*, 2 Ves. 193, *per* Lord Loughborough; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale.

[*(f)* *Heatley v. Thomas*, 15 Ves. 596.

[*(g)* *Heatley v. Thomas*, 15 Ves. 596; *Standford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant*, 1 B. C. C. 20.

[*(h)* *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale; *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; [*Davies v. Jenkins*, 6 Ch. D. 728; *Devitt v. Faussett*, 7 L. R. Ir. 511.]

[*(i)* *Stuart v. Kirkwall*, 3 Mad. 387; *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale; *McHenry v. Davies*, 10 L. R. Eq. 88; *Lancashire and Yorkshire Bank v. Tee*, W. N. 1875, p. 213.

[*(j)* *Morrell v. Cowen*, 6 Ch. D. 166, reversed on other grounds.]

[*(k)* *Re Sykes's Trusts*, 2 J. & H. 415.

<sup>1</sup> *Re Pryne*, 53 L. T. N. S. 465.

ment, such engagement had no effect either at law or in equity (*l*).] So, if she give a written \*retainer [\*762] to a *solicitor*, it entitles him to have his costs out of her separate estate (*a*), though the circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate is not, *per se*, sufficient to make that estate directly liable for the amount of his costs (*b*). And if she enter into a contract in writing for the purchase of an estate, she may enforce it against the vendor, as it creates a valid obligation in respect of her property (*c*). And it is not necessary that the contract should expressly refer to the separate property, or that the vendor should know that the purchaser was a married woman (*d*). In one case a *feme* executed a bond *before her marriage*, and her property having been settled upon her marriage to her separate use, the obligee filed his bill against the husband and wife to have the debt paid out of her separate estate, and the husband having absconded, the Court made the order (*e*). [But the engagement of a married woman has been held not to bind any separate property which she had not already acquired at the time of its being entered into (*f*).]

16. **Recent Act.** — Now by the Married Women's Property Act, 1882, sect. 1, sub-sect. (3), every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown; and by sub-sect. (4), every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. But the contract will

[(*l*) *Roberts v. Watkins*, 46 L. J. N. S. Q. B. 552.]

(*a*) *Murray v. Barlee*, 4 Sim. 82; 3 M. & K. 209.

(*b*) *Callow v. Howle*, 1 De G. & Sm. 531; and see *Re Pugh*, 17 Beav. 336.

(*c*) *Dowling v. Maguire*, Ll. & G. Rep. t. Plunket, 1; but see *Chester*

*v. Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(*d*) *Dowling v. Maguire*, Ll. & G. Rep. t. Plunket, 1.

(*e*) *Biscoe v. Kennedy*, cited *Hulme v. Tenant*, 1 B. C. C. 17.

[(*f*) *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Smith v. Lucas*, 18 Ch. D. 531; *King v. Lucas*, 23 Ch. D. 712.]



not affect property as to which there is a restraint on anticipation (*g*).

It is conceived that if a married woman enters into a contract and her husband dies, and she after his death acquires property, such property will not be bound by a judgment in an action for enforcing the contract, though instituted after the property has been acquired (*h*).

**Costs of raising the charge.**—The liability of the separate estate extends to the costs of an action to enforce the charge against the estate (*i*).]

17. **General engagements not in writing.**—It has been [\*763] stated that a *feme covert* makes her separate \*property liable by the execution of any *written* instrument; and to that extent there can be no question; but the principles upon which the liability was held to attach were until recently involved in much doubt. Thus it was considered by Lord Loughborough (*a*), Sir J. Leach (*b*), and the late Vice-Chancellor of England (*c*), that the separate estate of a *feme covert* was not subject to her *general engagements*, and this upon the notion that a *feme covert* could not contract, but that every dealing in respect of her estate was in the nature either of an *appointment* or of a *disposition* (*d*). However, it is clear that [irrespective of the recent Act] a *feme covert* can, in respect of her separate use, contract (*e*), and that her written obligations are not to be viewed as appointments, and do not operate merely by way of disposition.

[*g*] Sect. 19; and see *post*, p. 787.]

[*h*] See *Re Price*, 28 Ch. D. 709; and see *ante*, p. 753.]

[*i*] *Morrell v. Cowan*, 6 Ch. D. 106; and see now 45 & 46 Vict. c. 75, s. 1 (2).]

(*a*) See *Bolton v. Williams*, 2 Ves. jun. 142, 150, 156; *Whistler v. Newman*, 4 Ves. 145.

(*b*) See *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, *ib.* 389; *Aguilar v. Aguilar*, 5 Mad. 418; *Field v. Sowle*, 4 Russ. 114; *Chester v. Platt*, *Sugd. Vend. & Purch.* 207, 14th edit.

(*c*) See *Murray v. Barlee*, 4 Sim.

82; and see *Digby v. Irvine*, 6 Ir. Eq. Rep. 149.

(*d*) See *Bolton v. Williams*, 2 Ves. jun. 150; *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, *ib.* 389; *Aguilar v. Aguilar*, 5 Mad. 418; *Field v. Sowle*, 4 Russ. 114.

(*e*) See *Owens v. Dickenson*, Cr. & Ph. 53; *Dowling v. Maguire*, Rep. t. Plunket, 19; *Master v. Fuller*, 4 B. C. C. 19; *Stead v. Nelson*, 2 Beav. 245; *Bailey v. Jackson*, C. P. Cooper's Rep. 1837-8, 495; *Francis v. Wiggzell*, 1 Mad. 261; *Crosby v. Church*, 3 Beav. 489; *Tullett v. Armstrong*, 4 Beav. 323.

The principles that govern the liability of a *feme's* separate property have been very satisfactorily explained by Lord Brougham and Lord Cottenham.

Lord Brougham's exposition of the principles which regulate the liability of the *feme's* separate estate. — Lord Brougham observed, "At first the Court supposed that nothing could touch the separate estate but some real charge, as a mortgage, or an instrument amounting to an execution of a *power*; but afterwards the Court only required to be satisfied that she *intended* to deal with her separate property. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all (*f*). *I own I can perceive no reason for drawing any such distinction*" (*g*).

\* Lord Cottenham's view of the principles regulating [\*764] the liability of the separate estate. — "A writing," says Lord Cottenham, "is operative upon a *feme's* separate estate, not by way of the execution of a *power*; for it neither refers to the power, nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are *paid pari passu*; whereas, if the instruments took effect as *appointments* under a power, they would rank according to the priorities of their dates. It has sometimes been treated as a *disposing* of the particular estate; but it is not correct, according to legal

(*f*) It may be observed that the late V. C. of England while expressing his opinion upon the hearing below, that the general engagements of the *feme covert* did not affect the separate estate, does not appear to

have conceived that any distinction existed between a written and unwritten obligation; see 4 Sim. 94.

(*g*) *Murray v. Barlee*, 3 M. & K. 223.

principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a *lien* on that property. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant (a)*, is more correct: viz.—If a married woman has power to deal with her separate property, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it. I observe that in *Clinton v. Willes (b)*, Sir Thomas Plumer suggested a doubt whether it was necessary that the *feme's* engagements should be secured by *writing*. It certainly seems strange that there should be any difference between a contract in writing and a verbal promise to pay, when no statute requires it to be in writing. *It is an artificial distinction not recognized in any other case (c)*.

**Results of judgments of Lord Cottenham and Lord Brougham.**

— The judgments of Lord Cottenham and Lord Brougham, before referred to, must be held to have clearly established that the dealings of a *feme covert* with her separate estate do not operate by way of *appointment* or *disposition*, and if this be so, it is difficult to see on what ground any valid distinction can be sustained between *written* and *verbal* engagements. If a written promise to pay, as a promissory note, referring neither to the instrument of trust nor to the property, be held to bind the separate estate, upon what ground can a verbal assumpsit be distinguished? So long as it could be maintained that the dealing of the married woman operated by way of *disposition* of the separate estate, there seemed room for contending that the disposition, as being an assignment of trust, must have been in writing (*d*); but so soon as it is admitted that the general engagement *in writing* binds, it seems impossible to resist the conclusion that a *verbal* general engagement must bind likewise. When it is attempted to imply a promise from mere *acts* of the *feme*, which [\*765] may be construed as intended to bind either her \* husband or herself, there seems room for a distinction,

(a) 1 B. C. C. 16.

(b) 1 Sugd. Pow. 208, n.

(c) *Owens v. Dickenson*, Cr. & Ph.

53.

(d) See page 761, *supra*.

but an *express verbal* promise and an *express written* promise to pay must, it is conceived, stand on the same footing.

**Observations of V. C. Kindersley respecting feme's verbal engagements.** — The late Vice-Chancellor Kindersley, upon this subject expressed himself as follows: — "It has not yet, indeed, been made the subject of positive decision, that the principle embraces a *feme's verbal* engagements or cases of common *assumpsit*. Considering, however, the opinions expressed and the reason of the thing, I think it very probable that when that question arises for decision, it will be decided in the affirmative" (a).

[Under the Married Women's Property Act, 1882, no distinction is made between written and verbal engagements and they both equally bind the separate estate (b).]

**Cases where writing is required.** — But a verbal engagement will not bind the wife where the Statute of Frauds requires, in the case of a *feme sole*, an engagement in *writing*, as if the *feme covert* were to undertake verbally to pay the debt of a stranger, or of her husband, who, for this purpose, is a stranger (c). It has even been held, in Ireland, that the general engagements of the wife *not in writing*, cannot, by reason of the Statute of Frauds, be satisfied out of any interest in *land* settled to her separate use (d). But this seems to involve a confusion between special contracts, which in the case of a *feme sole*, are required by the statute to be in writing, and general contracts, which, in the case of a *feme sole*, are not required to be in writing. In the latter case the remedy is against the *feme sole* personally, but where the *feme* is *covert*, is not against the *person*, but the *property*. The satisfaction, therefore, decreed against the separate estate is not the specific performance of a special contract, but an *equitable execution by way of legal process* for working out the liability created by the general contract.

(a) *Vaughan v. Vanderstegen*, 2 Drew. 183; and see *Wright v. Chard*, 4 Drew. 673; *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, 2 L. R. Eq. 182; 35 Beav. 489.

[(b) 45 & 46 Vict. c. 75, s. 1 (3).]

(c) *Re Sykes's Trust*, 2 J. & H. 415.

(d) *Burke v. Tuite*, 10 Ir. Ch. Rep. 407; and see *Shattock v. Shattock*, 2 L. R. Eq. 192; *Johnson v. Gallagher*, 2 De G. F. & J. 514.

18. **Whether separate estate can be made liable by operation of law in clear contravention of the intention.** — It has been considered that there is still another distinction, viz., that, allowing the *general* engagements of the wife, whether written or unwritten, to bind her separate estate, yet, supposing the doctrine of these cases to be founded on the *intention* to charge the settled property as implied by the circumstance that otherwise the act would be nugatory, the same result will not follow where it was clearly *not* the intention of the

*feme* to create any charge — where, in short, there [\*766] was no contract either express or implied. \* Thus it

was decided, that where an annuity granted by a *feme covert* and charged upon her separate estate, had been set aside as void for want of compliance with the requisitions of the Annuity Acts, the separate estate was not liable to repay the consideration money (*a*); and the decisions to this effect were cited, without disapprobation, by L. J. Turner (*b*). And where a married woman received rents claiming them as her separate property, but was in fact not entitled, Vice-Chancellor Kindersley held that the rents so received could not be recovered from her separate estate (*c*).

19. **A feme covert having separate estate is a feme sole to all intents and purposes.** — The Vice-Chancellor at the same time observed, “The doctrine (of the separate use) is now in a state of transition, and is not clearly established in all its points; but the modern tendency has been to establish the principle, that *if you put a married woman in the position of a feme sole in respect of her separate estate, that position must be carried to its full extent, short of making her personally liable*” (*d*).

[This, however, must be understood in respect only of the separate estate to which the married woman was actually entitled at the time of the engagement, which it is sought to enforce against her separate estate; for a married woman

(*a*) Jones v. Harris, 9 Ves. 486; F. & J. 513; and see Shattock v. Aguilar v. Aguilar, 5 Mad. 414; and Shattock, 2 L. R. Eq. 182; 35 Beav. see Bolton v. Williams, 4 B. C. C. 297; 489.  
S. C. 2 Ves. jun. 138. (*c*) Wright v. Chard, 4 Drew. 673.

(*b*) Johnson v. Gallagher, 3 De G. (*d*) Ib. 4 Drew. 685.

does not, by *having separate estate*, acquire an equitable *status* of capacity to contract debts, so as to enable her to bind separate estate to which she may afterwards become entitled, but, prior to the Married Women's Property Act, 1882, could only contract with reference to separate estate to which she was actually entitled, and so as to bind that estate (*e*). So where an infant *feme*, in contemplation of her marriage, covenanted to settle all her after-acquired property, and subsequently, after attaining her majority but prior to the Married Women's Property Act, 1882, confirmed the settlement, it was held that this confirmation made the settlement absolutely binding only so far as related to property which she had already acquired at the time of confirmation, but that as to property which she might afterwards acquire for her separate use the covenant would remain voidable, and the married woman might, on such subsequent property accruing, elect to avoid the settlement as to it, and take it for her separate use (*f*).

Now, by the recent Act, a contract entered into by a married \*woman will bind not only the separate [\*767] estate which she has at the date of the contract, but also all separate property which she may thereafter acquire (*a*). The Act does not expressly state whether it affects contracts entered into prior to the commencement of the Act (1st Jan. 1883), for enforcing which proceedings are taken after that date; but the language of the 1st section points to future contracts, and in the absence of express words the Act should be construed so as not to affect liabilities under engagements already in existence at the commencement of the Act (*b*).

But an order made by consent after the commencement of the Act in an action relating to a contract before the Act, whereby all questions under the contract were referred to arbitration, and the parties bound themselves to perform

[(*e*) *Pike v. Fitzgibbon, Martin v. Fitzgibbon*, 17 Ch. D. 454.]

[(*f*) *Smith v. Lucas*, 18 Ch. D. 531.]

[(*a*) 45 & 46 Vict. c. 75, s. 1 (4).]

[(*b*) *Conolan v. Leyland*, 27 Ch. D. 632; and see *Re March*, 27 Ch. D.

166; *Turnbull v. Forman*, 15 Q. B. D. 234.]

and keep the award, was held to be a new contract, and to be within the Act (c).]

20. **True principle.**—The principle [affecting cases not within the recent Act,] so far as the authorities have *hitherto gone*, is thus laid down by L. J. Turner. “To affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not affect it in the case of a married woman living with her husband,” &c. “In order,” he continued, “to bind the separate estate by a *general engagement*, it should appear that the engagement was made *with reference to, and upon the faith or credit of that estate, and the question whether it was so or not is to be judged of by the Court upon all the circumstances of the case*” (d). These opinions have since been indorsed by the Court as a correct exposition of the law (e). In a late case Lord Justice James, in further illustration of the subject, observed, “The term *general engagement* is a misleading one. If it merely mean that goods sold to a married woman in the ordinary course of domestic life—that contracts expressed to be made by her in respect of property not her separate [\*768] estate—*e.g.* for buying \*or selling, or letting or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent the proposition that her separate estate is not liable to her general engagements is quite correct. But that does not affect the rule, as laid down by Lord Justice Turner, as to general engagements, as to which it appears that they were made with ref-

[(c) *Conolan v. Leyland*, 27 Ch. D. 632.]

(d) *Johnson v. Gallagher*, 3 De G. F. & J. 515; see the principle approved and expanded by Sir R. T. Kindersley, V. C., in *Re Leeds Banking Company*, 3 L. R. Eq. 787; and see the same principle approved by

V. C. Malins in *Butler v. Cumpston*, 7 L. R. Eq. 20; and by V. C. in Ireland, in *Hartford v. Power*, 3 I. R. Eq. 602; and by Lord Hatherley in *Picard v. Hine*, 5 L. R. Ch. App. 274.

(e) See *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 591; and see preceding note.

erence to, and upon the faith or credit of, the separate estate. It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor or a surveyor, or a builder or tradesman, or hire labourers or servants, and very unjust if she did that they should have no remedy against such separate property" (a).

[21. Where a married woman is living separate from her husband, and monies are advanced by a stranger in providing her with necessaries, such monies constitute a debt binding her separate estate (b).]

22. **Liability of estate of feme covert to make good her breaches of trust.** — The inquiry now under consideration involves the question how far a *feme covert* [could before the Married Women's Property Act, 1882,] commit a *breach of trust* for which her separate estate would be made liable. Where the breach of trust resulted in the loss of the very fund in which the *feme* had an interest to her separate use, the Court treated her acts as amounting to a *disposition* of the separate interest which she had power to bind (c). So if a *feme covert* who was *executrix* or *trustee* had wasted the trust estate, the ordinary right of retainer might be exercised against her separate estate under the *same* instrument (d). And the separate estate of a married woman under a settlement was held liable to make good the loss occasioned by her wrongfully selling absolutely a valuable chattel in which, under the *same* settlement, she had only a limited interest (e). And the separate estate has been made to answer a debt of the wife *contracted before marriage* (f); and by the Married Women's Property Act, 1870 (g), property belonging to a *feme* and settled by her to her *separate use without power of anticipation*, was made liable to such a debt (h).

(a) London Chartered Bank of Australia v. Lamprière, 4 L. R. P. C. 593.

[(b) Hodgson v. Williamson, 15 Ch. D. 87.]

(c) Crosby v. Church, 3 Beav. 485; Hanchett v. Briscoe, 22 Beav. 496.

(d) Pemberton v. M'Gill, 1 Dr. & Sm. 266; and see p. 696, *supra*.

(e) Clive v. Carew, 1 J. & H. 199.

(f) Chubb v. Stretch, 9 L. R. Eq. 555.

(g) 33 & 34 Vict. c. 93, s. 12.

(h) Sanger v. Sanger, 11 L. R. Eq. 470; [London and Provincial Bank v. Bogle, 7 Ch. D. 773.]



But where an annuity was devised to a *feme sole* in trust to apply it for the benefit of another, and the *feme* [\*769] afterwards married and \*property was settled to her separate use, and then there was a breach of trust in respect of the annuity, the M. R. held that the effect of the marriage was to vest the legal estate of the annuity in the husband, that she could only act as his agent, that she could not be made liable for general torts in reference to trusts any more than for general torts at law — that strictly speaking she could not commit torts, but that they were the torts of her husband, and her acts created a liability against her husband: that he acted for her although she remained trustee, just as the husband of an executrix acted for the executrix, that her receipts must be treated as his receipts, and he alone was liable, and on these grounds the M. R. refused all relief against the separate property of the wife (a).

[23. **Married Women's Property Act, 1882.** — Now by the recent Act (b), sect. 1, a married woman may be sued in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and any damages or costs recovered against her are payable out of her separate estate, and not otherwise; and by sect. 13, to the extent of her separate estate, her liability continues after her marriage “for all debts contracted, and all contracts entered into, or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory” to any joint stock company; and by sect. 19, no restriction against anticipation contained in any settlement of a woman's own property to be made by herself is to have any validity against debts contracted by her before marriage, and no settlement is to have any greater force or validity against creditors of such a woman than a like settlement made by a man would have against his creditors; and sect. 24 expressly provides that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any *breach of trust or devastavit* committed by any married woman being a trustee, or executrix or administratrix either before or after her marriage.]

(a) *Wainford v. Heyl*, 20 L. R. [ (b) 45 & 46 Vict. c. 75.]  
Eq. 321.

24. *Nature of the relief against the separate estate.*—Supposing a person entitled to establish his claim against the separate estate, the limits of his remedy appear to be [as follows: Prior to the recent Act he could] not bring an action against the *feme covert* as the sole defendant and as *personally* liable (c). “There is no case,” said Sir T. Plumer, “in which this Court has made a *personal* decree against a *feme covert*. She may pledge her separate property; and make it answerable for her \*engagements; but where her [\*770] trustees are not made parties to a bill and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained” (a). But the party aggrieved might have brought an action against her and her trustees (and the death of her husband, which put an end to the separate use, either after the commencement of the action (b), or even before it (c), would not have defeated the action), and might have prayed payment of his demand out of all *personal estate* in the hands of the trustees to which she was entitled absolutely (including *arrears* of rents), and also out of the *accruing* rents of *real estate*, if there were no clause against anticipation, until the claim and costs had been satisfied (d). “Determined cases,” said Lord Thurlow, “seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate*, and *rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any *direct* process against the separate estate of the wife, and the man-

[(c) Where a judgment had been obtained against a married woman, it was on her application set aside, after a considerable lapse of time, as being irregular and wrong, *Atwood v. Chichester*, 3 Q. B. D. 722; *Davis v. Ballenden*, 46 L. T. N. S. 797.]

(a) *Francis v. Wigzell*, 1 Mad. 262. [But see *Picard v. Hine*, 5 L. R. Ch. App. 274; *Davies v. Jenkins*, 6 Ch. D. 728.]

(b) *Field v. Sowle*, 4 Russ. 112.

(c) *Heatley v. Thomas*, 15 Ves. 596; but see *Kenge v. Delavall*, 1 Vern. 326.

(d) *Hulme v. Tenant*, 1 B. C. C. 20; *Standford v. Marshall*, 2 Atk. 68; *Murray v. Barlee*, 4 Sim. 82; 3 M. & K. 209; *Field v. Sowle*, 4 Russ. 112; *Nantes v. Corrock*, 9 Ves. 182; *Bullpin v. Clarke*, 17 Ves. 365; *Jones v. Harris*, 9 Ves. 492, 493, 497; *Stuart v. Kirkwall*, 3 Mad. 387.

ner of coming at the separate property of the wife has been by decree to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice or of the engagement of the wife to be carried into execution." His Lordship then adds, "I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife" (e). But it is conceived that if in any case the instrument were so specially worded as to place the *corpus* of real estate also at the *separate disposal* of the *feme covert*, the engagements of the wife would, upon principle [independently of the recent Act, have bound] the whole interest settled to the separate use, whether *corpus* or income (f).

[Where the property is acquired subsequent to the engagement.—A judgment recovered against the separate estate of a married woman in respect of an engagement [\*771] not within the recent Act, \*binds only so much of the separate estate as the married woman was entitled to at the time when the engagement was entered into, and as remains undisposed of at the time of the judgment, and does not affect separate estate acquired subsequently to the engagement (a). In such a case, therefore, the proper inquiry to be inserted in a judgment against the separate estate is, "what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable of being reached by the judgment and execution of the Court" (b).

(e) *Hulme v. Tenant*, 1 B. C. C. 20, 21; and see *Boughton v. James*, 1 Coll. 26; *Nantes v. Corrock*, 9 Ves. 189.

(f) See p. 770 and p. 803, note (c).

[(a) *Pike v. Fitzgibbon*, 17 Ch. D. 454; reversing S. C. 14 Ch. D. 837; *Flower v. Buller*, 15 Ch. D. 665; *Chapman v. Biggs*, 11 Q. B. D. 27;

and see as to the effect of the recent Act *ante*, p. 766.]

[(b) *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon*, 17 Ch. D. 454; *Durrant v. Ricketts*, 8 Q. B. D. 177; 30 W. R. 428; *Gloucestershire Banking Company v. Philipps*, 12 Q. B. D. 533; and see *Gallagher v. Nugent*, 8 L. R. Ir. 353.]

**Where clause against anticipation.**—If there be a clause against anticipation as to any part, the Court directs payment out of the *feme's* separate estate, except that part of which she has no power of anticipation (*c*); and separate estate as to which anticipation was restrained at the time of the engagement, will not become available for the payment by reason of the determination of coverture before the date of the judgment (*d*), and in this respect the law is not altered by the recent Act (*e*).

**Equitable execution without new proceedings.**—The remedy against the separate estate is in the nature of equitable execution, which may be obtained either by the appointment of a receiver or by a direction to the trustees to pay, and if any proceedings are pending between the married woman and her creditor, the order may be obtained in such proceedings without instituting a fresh action (*f*).

**25. Trustee not a necessary party.**—The rule that the trustees of the property, held for the separate use of a *feme covert*, must be parties to a suit for charging that property has in recent cases been broken through. Thus, in *Picard v. Hine* (*g*), where the trustee of a particular property was a defendant, the Court made a decree in a general form declaring that the separate property of the *feme covert*, vested in her or in *any other person* in trust for her, was chargeable with the payment of the plaintiff's debt, and in a later case *V. C. Hall*, on the authority of *Picard v. Hine*, held expressly that it was not necessary to make the trustees parties (*h*). But any order made in the absence of the \* trustees [\*772] must be without prejudice to any claims they may have against the trust estate (*a*).

**Nor the husband.**—Now, by the recent Act, although the

[(*c*) *Murray v. Barlee*, 4 Sim. 95.]

[(*d*) *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon*, 17 Ch. D. 454, reversing S. C. 14 Ch. D. 837.]

[(*e*) *Myles v. Burton*, 14 L. R. Ir. 258.]

[(*f*) *Re Peace and Waller*, 24 Ch. D. 405.]

[(*g*) 5 L. R. Ch. App. 274.]

[(*h*) *Davies v. Jenkins*, 6 Ch. D. 728; *Flower v. Buller*, 15 Ch. D. 605; *Durrant v. Ricketts*, 8 Q. B. D. 177; but see *Atwood v. Chichester*, 3 Q. B. D. 722.]

[(*a*) *Collett v. Dickenson*, 11 Ch. D. 687; *Re Peace and Waller*, 24 Ch. D. 405.]

ultimate remedy is only against the separate estate, the action may be brought against the married woman as if she were a *feme sole* without joining either her husband or any trustee as a party, and a judgment obtained against the married woman (*b*). This judgment can, however, only be enforced against the separate estate, but it is available (in cases where the engagement in respect of which it is obtained was made after the 31st of December, 1882) against any separate estate of the married woman whether acquired before or after the date of the engagement (*c*).

26. **Form of judgment against separate estate.**—Under the recent Act, judgment in default or under Ord. 14 of the Rules of the Supreme Court may be signed against a married woman, but execution can only issue against her separate estate as to which her anticipation is not restrained (*d*), unless the restraint arises under a settlement made by the married woman herself of her own property (*e*). The judgment should expressly state that “execution is limited to such separate estate as she is not restrained from anticipating, unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself” (*f*).

27. **No injunction to restrain dealing with separate estate until claimant's right established.**—A person entitled to establish a claim against the separate estate of a *feme covert* cannot obtain an injunction against her to restrain her from dealing with it until his right has been established by obtaining a judgment (*g*).

28. **Statute of Limitations.**—Where] the creditor proceeds not against the *feme covert* personally, but against her separate property as a trust fund, it has been held, though not

[(*b*) *Brown v. Morgan*, 12 L. R. Ir. 122.]

[(*c*) 45 & 46 Vict. c. 75, s. 1; *Bursill v. Tanner*, 13 Q. B. D. 691; but see *Moore v. Mulligan*, W. N. 1884, p. 34.]

[(*d*) *Perks v. Mylrea*, W. N. 1884, p. 64; and as to the practice before

the Act, *Ortner v. Fitzgibbon*, 50 L. J. N. S. Ch. 17; 43 L. T. N. S. 60.]

[(*e*) *Bursill v. Tanner*, 13 Q. B. D. 691.]

[(*f*) *Bursill v. Tanner*, 13 Q. B. D. 691.]

[(*g*) *Robinson v. Pickering*, 16 Ch. D. 660, reversing S. C. 16 Ch. D. 371.]

without a conflict of judicial opinion, that the *Statute of Limitations* does not apply and cannot be pleaded (*h*). [But it is conceived that a married woman may, if sued under the first section of the Married Women's Property Act, 1882, plead the statute of limitations in bar.]

\* 29. **Stock settled to the separate use.**—In one [\*773] case the Court refused to hold the *Bank Annuities* of a *feme covert* liable, as stock could not, in the case of a person *sui juris* be taken in execution (*a*): but now that stock is available to the creditor (*b*), the distinction may be considered as obsolete.

30. **Assignment good against creditor.**—As the process against the separate property of the wife in her lifetime is in the nature of an *equitable execution*, it may, like an execution at law, be defeated by a *bonâ fide* assignment to a purchaser or mortgagee (*c*).

31. **Creditor's suit after death of feme covert.**—After the death of the *feme covert* the creditor may bring an action for payment of his debt out of her separate estate (*d*); and Sir W. Grant ruled that all the creditors, whether by specialty or simple contract, should be paid *pari passu* (*e*). But according to Lord Romilly the debts should be paid in order of priority (*f*). Two conflicting principles were in fact then at work in different branches of the Court (*g*): one was, that the general engagements of the wife are charges on the separate property equivalent to so many assignments, and if so, the debts would be payable in order of date: the other was, that the general engagements are not charges, but create a liability, the remedy for which, if the *feme* were *sole*, would be against the person, but as she is *covert*, there is no remedy

(*h*) Norton v. Turvill, 2 P. W. 144; [Hodgson v. Williamson, 15 Ch. D. 87;] Vaughan v. Walker, 6 Ir. Ch. Rep. 471; 8 Ir. Ch. Rep. 458.

(*a*) Nantes v. Corrock, 9 Ves. 182.

(*b*) 1 & 2 Vict. c. 110, s. 14.

(*c*) Johnson v. Gallagher, 3 De G. F. & J. 520, per L. J. Turner.

(*d*) See Owens v. Dickenson, Cr. & Ph. 48; Gregory v. Lockyer, 6 Mad.

(*e*) Anon. 18 Ves. 258; and see Johnson v. Gallagher, 3 De G. F. & J. 520.

(*f*) Shattock v. Shattock, 2 L. R. Eq. 182. The decision in this case involved a sum of 14l. 15s. only, so that of course there was no appeal.

(*g*) Compare Johnson v. Gallagher, 3 De G. F. & J. 494, and Shattock v. Shattock, 2 L. R. Eq. 182.

against the person, but the law gives an equitable execution against the property; and in this view the separate estate would be applicable as assets *pari passu*. Of these two principles the latter is clearly the more correct one (*h*).

[32. **Earnings.** — The earnings of a *feme covert*, which under the Married Women's Property Acts, belong to her for her separate use, are like her other separate estate divisible upon her death amongst her creditors *pari passu* (*i*).]

33. **Funeral expenses.** — It has been doubted whether the funeral expenses of the wife should be thrown upon her separate estate (*j*).

34. **Savings.** — The savings by a *feme covert* out of her separate estate form part of it, and are equally at her [\*774] exclusive disposal, or, according to \* the language of an early authority, "the sprout is to savour of the root and to go the same way" (*a*); and the same has been held with respect to savings out of a maintenance allowed on separation (*b*). Where a fund is settled to the separate use of a married woman and her *anticipation is restrained*, as the income when actually accrued is at her absolute disposal, any savings from the income, though invested by her in the name of the trustees of the original settlement, will not be subject to the fetter against anticipation which attached to the *corpus* whence the savings proceeded (*c*). Savings out of money given to the wife by her husband for *household purposes, dress, or the like*, belong to the husband (*d*).

35. **Power of disposition by will of separate estate.** — A *feme covert* has, as incident to her separate estate, a power to dispose of it, whether it be real or personal, not only by act *inter vivos*, but also by *testamentary instrument* in the nature of a will (*e*). [And her will will be effectual to pass after

(*h*) See now the observations of the Court in *London Chartered Bank of Australia v. Lempière*, 4 L. R. P. C. 594.

(*i*) *Thompson v. Bennett*, 6 Ch. D. 739.]

(*j*) *Gregory v. Lockyer*, 6 Mad. 90.

(*a*) *Gore v. Knight*, 2 Vern. 535; *Molony v. Kennedy*, 10 Sim. 254; *Humphrey v. Richards*, 2 Jur. N. S.

432; [*Fitzgibbon v. Pike*, 6 L. R. Ir. 487.]

(*b*) *Brooke v. Brooke*, 25 Beav. 347; and see *Messenger v. Clarke*, 5 Exch. 388.

(*c*) *Butler v. Cumpston*, 7 L. R. Eq. 16.

(*d*) *Barrack v. McCulloch*, 3 K. & J. 114; see *Mews v. Mews*, 15 Beav. 529.

(*e*) *Fettiplace v. Gorges*, 1 Ves.

acquired separate property although she had no separate property at the time of making it (*f*),] and administration with the will annexed (where [no executors are appointed, or where] the executors die in her lifetime), will be granted not to her husband the survivor, but to her residuary legatees (*g*). And if a *feme* leave a will and make bequests, the usual course of administration will be observed. Thus, in the payment of her debts, the undisposed of interest will be first applied, then, general legacies, and, if there still be a deficiency, the specific legacies (*h*); and general legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death (*i*). And a general residue will sweep all arrears of income due at the time of the death (*j*).

**36. Separate estate undisposed of survives to the husband.** — If a *feme covert* having personal estate settled to her separate use die without disposing of it the husband will be entitled to it; \* as to so much thereof as may consist [\*775] of cash, furniture, or other *personal chattels*, in his marital right, and as to so much as may consist of "*choses en action*," upon taking out administration to his wife (*a*).

**37. Executors take as appointees.** — If a *feme covert* [in a case not governed by the Married Women's Property Act, 1882, make a will in exercise of a power and] appoint *executors*, they do not take all the separate property *jure representationis*, but as appointees under the power to the extent

jun. 46; *Rich v. Cockell*, 9 Ves. 369; *Humphrey v. Richards*, 2 Jur. N. S. 432; *Moore v. Morris*, 4 Drew. 38; *Pride v. Bubb*, 7 L. R. Ch. App. 64; *Noble v. Willock*, 8 L. R. Ch. App. 778; *S. C. nom. Willock v. Noble*, 7 L. R. H. L. 580; *Taylor v. Meads*, 4 De G. J. & S. 597; [*Bishop v. Wall*, 3 Ch. D. 194.]

[(*f*) *Charlemont v. Spencer*, 11 L. R. Ir. 347, 490.]

(*g*) [*Brenchley v. Lynn*, 2 Rob. 441; *Re Goods of Maria Bailey*, 2 Sw. & Tr. 135; and see] *Re Goods of Pine*, 1 L. R. P. & D. 388; *Re Goods of M. Fraser*, 2 L. R. P. & D. 183.

(*h*) *Norton v. Turvill*, 2 P. W. 144.

(*i*) See *Tatham v. Drummond*, 2 H. & M. 262; the case of a will executing a special power.

(*j*) See *Tatham v. Drummond*, 2 H. & M. 262.

(*a*) *Proudley v. Fielder*, 2 M. & K. 57; *Molony v. Kennedy*, 10 Sim. 254; *Bird v. Peagram*, 13 C. B. 639; *Johnstone v. Lumb*, 15 Sim. 308; *Drury v. Scott*, 4 Y. & C. 204; *Askew v. Rooth*, 17 L. R. Eq. 426; *Tugman v. Hopkins*, 4 Man. & G. 389; *Archer v. Lavender*, 9 I. R. Eq. 220; [see *ante*, p. 752, as to the effect of the Married Women's Property Act, 1882.]



of the fund appointed (*b*). And therefore if the will do not dispose of [the separate property not subject to the power] the executors take only the [property] disposed of, while the husband takes such chattels as are in possession, and as regards *choses en action* there must be letters of administration (*c*).

[**Secus, where will not under a power, or made since the Married Women's Property Act.**— But if the *feme covert* being possessed of separate personal estate make a will, not under a power, but by virtue of her right as a married woman to dispose of her separate estate, and appoint executors, and direct them to pay legacies, they are entitled to probate, and all the separate estate vests in them *jure representationis* (*d*). And since the Married Women's Property Act, 1882, if a married woman make a will in execution of a power and also appoint executors they are entitled to probate in general form and the right of the husband to administration *cæterorum* is excluded (*e*).]

38. **Separate use invested on land.**— If a *feme covert* having income settled to her separate use, lay out the savings in a *purchase of land* in the name of a trustee, [or in her own name,] the land on her dying intestate will descend to the heir and not be personal estate in equity for the benefit of the administrator (*f*).

[39. **Appointment does not pass savings after the termination of the coverture.**— A testamentary appointment by a *feme covert* will not pass dividends arising after the termination of the coverture from property settled to her separate use for life with a power of appointment \* by

[(*b*) If a married woman execute a power by will, the instrument though in form a will is in fact a conveyance by means of the appointment exercised, and although an executor is appointed, he takes nothing in his character of personal representative, *per* Sir James Hannen, *Re Goods of Tomlinson*, 6 P. D. 209; and on this principle probate has been refused of a will by a married woman appointing real estate under a power and

constituting executors; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *Re Goods of Barden*, 1 L. R. P. & D. 325; *Re Goods of Tomlinson*, *ubi supra*.]

(*c*) *Tugman v. Hopkins*, 4 Man. & G. 389.

[(*d*) *Brownrigg v. Pike*, 7 P. D. 61.]

[(*e*) *Re Goods of Ievers*, 13 L. R. Ir. 1.]

(*f*) *Steward v. Blakeway*, 6 L. R. Eq. 479; 4 L. R. Ch. App. 603.

deed or will, and in default of appointment, in the event of her surviving her husband, for her, her executors, administrators, and assigns, or investments which have been acquired by her after the termination of the coverture from the sale and reinvestment of property subject to the power of appointment (*a*).]

40. **Arrears of separate estate.**—If the husband receive the wife's separate income, it is clear that neither the wife nor those entitled under her can claim against the husband or his estate, or any one standing in his place (*b*), *more than one year's arrears*, but it is still *sub judice* whether the wife or her representative can claim even so much. Lord Macclesfield (*c*), Lord Talbot (*d*), Lord Loughborough (*e*), Sir W. Grant (*f*), and Lord Chancellor Brady (*g*) held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell (*h*), Lord Camden (*i*), Lord King (*j*), Lord Hardwicke (*k*), Lord Eldon (*l*), Sir J. Leach (*m*), Sir J. Stuart (*n*), Lord St. Leonards (*o*), Smith, M. R., in Ireland (*p*), and Dobbs, J., in the Landed Estate Court (*q*), the husband's estate is liable to an account for one year (*r*). Where there is such a conflict of author-

[(*a*) *Mayd v. Field*, 3 Ch. D. 587. See as to the effect of a will, made since the Married Women's Property Act, 1882, by a married woman, of property acquired after the termination of the coverture, *ante*, p. 753.]

(*b*) *Payne v. Little*, 26 Beav. 1.

(*c*) *Powell v. Hankey*, 2 P. W. 82.

(*d*) *Fowler v. Fowler*, 3 P. W. 353. (N.B. A case of pin-money.)

(*e*) *Squire v. Dean*, 4 B. C. C. 325; *Smith v. Camelford*, 2 Ves. jun. 716.

(*f*) *Dalbiac v. Dalbiac*, 16 Ves. 126.

(*g*) *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511.

(*h*) *Burdon v. Burdon*, 2 Mad. 286, note.

(*i*) *Ib.* p. 287, note.

(*j*) *Countess of Warwick v. Edwards*, 1 Eq. Ca. Ab. 140. In *Thomas v. Bennet*, 2 P. W. 341, his Lordship probably held only that *ten years'* arrears could not be given.

(*k*) *Townshend v. Windham*, 2 Ves. sen. 7; *Peacock v. Monk*, 2 Ves. sen. 190; *Aston v. Aston*, 1 Ves. sen. 267.

(*l*) *Parkes v. White*, 11 Ves. 225; *Brodie v. Barry*, 2 V. & B. 36.

(*m*) *Thrupp v. Harman*, 3 M. & K. 513.

(*n*) *Lea v. Grundy*, 1 Jur. N. S. 953.

(*o*) Property was administered by D. P. p. 169.

(*p*) *Corbally v. Grainger*, 4 Ir. Ch. Rep. 173; *Mackey v. Maturin*, 15 Ir. Ch. Rep. 160.

(*q*) *Re Kirwan*, 1 Ir. Rep. Eq. 553.

(*r*) In *Howard v. Digby*, 2 Cl. & Fin. 643, 665, Lord Brougham thought that in *separate use*, as distinguished from *pin-money*, the wife or her representatives could recover the whole arrears, but this is clearly untenable; see *Arthur v. Arthur*,

ity it is hard to say which way the balance inclines. The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate. Should the husband die *insolvent*, could she recover anything from the trustees on the ground of misapplication? and if the payment was a proper one, why should it be recoverable from the estate of the husband? The \*wife's assent must be deemed to continue until revoked by something either expressed or implied.

41. **Wife's acquiescence in receipt of her separate income by husband presumed.** — The principle upon which the relief against the husband's estate is thus denied is, that the Court *presumes* the acquiescence of the wife in the husband's receipt *de anno in annum* (a). If, therefore, the wife did not in fact consent to the husband's receipt, but remonstrated and required that the separate income should be paid to herself, the Court will carry back the account of the arrears to the time of the wife's assertion of her claim (b). But the Court requires very clear evidence that the demand was seriously pressed by the wife, and will not charge the husband's estate from any idle complaints against his receipt which the wife may have occasionally made (c). There can be no acquiescence by the wife, and, therefore, no waiver of her rights where the income has not actually come to the hands of the husband, as where it is still in the hands of a receiver (d).

42. **Case of feme covert being non compos.** — As the Court proceeds upon the notion of the wife's acquiescence, the question arises where she is *non compos*, and so *incapable* of waiving her right, whether the husband's estate shall not be liable for the entire arrears; and it would seem that in

11 Ir. Eq. Rep. 513. In the same case the V. C. of England, when the cause was before him, hesitated whether the general rule gave an account for a year or none at all; see *Digby v. Howard*, 4 Sim. 601.

(a) *Caton v. Rideout*, 2 H. & Tw. 41; see *Dixon v. Dixon*, 9 Ch. D. 587; *Re Lulham*, 53 L. J. N. S. Ch. 928.

(b) *Ridout v. Lewis*, 1 Atk. 269;

*Moore v. Moore*, 1 Atk. 272; see *Moore v. Earl of Scarborough*, 2 Eq. Ca. Ab. 156; *Parker v. Brooke*, 9 Ves. 583; [*Dixon v. Dixon*, 9 Ch. D. 587.]

(c) *Thrupp v. Harmon*, 3 M. & K. 512; *Corbally v. Grainger*, 4 Ir. Ch. Rep. 173.

(d) *Foss v. Foss*, 15 Ir. Ch. Rep. 215.

such a case the husband's estate must account for the whole, but will be entitled to an allowance for payments made for the wife's benefit, and which ought properly to have fallen on her separate estate (*e*).

43. In *Howard v. Digby* (*f*), a woman's *pin-money* was distinguished from ordinary *separate use*, and it was held as to *pin-money* that the wife's *representative* (*g*) could make no claim to any arrears. The ground upon which the House proceeded was that *pin-money* was for the personal use and ornament of the wife, and the husband had a right to see the fund properly applied, and that if the husband himself found the necessaries for which the *pin-money* was intended, the wife or her representative could have no claim against the husband's estate when the requirements for her personal use and ornament had ceased (*h*). Lord St. Leonards has justly questioned these principles (*i*), and it remains to be seen whether any distinction \* between *pin-* [\*778] *money* and *separate use* generally can be maintained.

44. *Gift of corpus to husband not resumed.*—As regards the *corpus of the separate estate* no presumption arises in favour of a husband who has received it. He is *primâ facie* a trustee for his wife, and a gift from her to him will not be inferred without clear evidence (*a*). [Thus, where a legacy bequeathed to the separate use of a wife was paid by a banker's draft payable to her order, and she indorsed the draft and handed it over to her husband, who paid it into his own bank, and had the amount carried over to a deposit account in his name, it was held that this was not sufficient to deprive the wife of her right (*b*). So where shares in a company, which were appropriated to a married woman as part of her share of a residue bequeathed to her for her separate use,

(*e*) *Attorney-General v. Parnter*, 3 B. C. C. 441; 4 B. C. C. 409; *Howard v. Digby*, 2 Cl. & Fin. 671, 673.

(*f*) 2 Cl. & Fin. 634; 4 Sim. 588.

(*g*) Lord Brougham considered the wife herself might in her lifetime have recovered one year's arrears; see 2 Cl. & Fin. 643, 653, 659.

(*h*) See, too, *Aston v. Aston*, 1 Ves. sen. 267; *Fowler v. Fowler*, 3 P. W. 355; *Barrack v. McCulloch*, 3 K. & J. 110.

(*i*) *Law of Property as administered by D. P.* p. 162.

(*a*) *Rich v. Cockell*, 9 Ves. 369.

[*(b)* *Green v. Carlill*, 4 Ch. D. 882.]

were transferred into the name of the husband, and he made an entry in his ledger that the shares were part of his wife's portion of the testator's estate, the separate use of the wife was not destroyed (*c*); and the husband's estate was held liable for the proceeds of new shares which had been allotted in respect of the old shares, and had been sold by him (*d*).] But the employment of the money by the husband in his business and for his family expenditure with the knowledge and assent of his wife, will, in the absence of agreement to the contrary, amount to a gift by her (*e*). Where a joint account was opened at a bank in the names of the husband and wife, and each of them had power to draw on the account, and each of them had also a separate account at other bankers, and the monies credited to the joint account were chiefly derived from the wife's separate income, it was held that the monies paid in had ceased to be part of the separate estate of the wife.<sup>1</sup>

**45. Feme not bound to contribute to household expenses.** — Occasionally a *feme covert* has a large income from property settled to her separate use, and being of penurious habits accumulates the whole, and yet looks to her much poorer husband for her support. This is a hard case, but it is said that the Court cannot advert to the question whether she accumulates or not (*f*).

**[46. Trespass on wife's separate property.** — Where the house in which the wife resides is settled to her separate use, and the husband has been guilty of improper conduct, and claims to use the house not for the purpose of consorting with his wife, but for his own purposes, the Court will grant an injunction to restrain him from entering the house (*g*).

And a married woman, in the sole occupation of a house bought out of her own earnings, can sue a stranger for a trespass in having entered the house without her leave, even

[*(c)* *Re Curtis*, 52 L. T. N. S. 244.]

[*(f)* *Re Smith's Trusts*, W. N.

[*(d)* *Re Curtis* (No. 2), W. N. 1867, p. 283.

1885, p. 55.]

[*(g)* *Symonds v. Hallett*, 24 Ch.

[*(e)* *Gardner v. Gardner*, 1 Giff. 126.

D. 346; *Green v. Green*, 5 Hare, 400, n.; *Wood v. Wood*, 19 W. R. 1049.]

<sup>1</sup> *Re Young*, 28 Ch. D. 705.

though the entry was made under the authority of her husband (*h*).]

\* 47. **Separate use may extend to corpus, or to income beyond coverture.** — It has never been questioned but that if *personal* estate be given to a *feme covert* for her separate use, her power of disposition extends over the *corpus*; and so, if the income of property be limited to a *feme covert* for her *life*, either in possession or reversion, for her separate use, or if the absolute interest be given to her in reversion for her separate use, if it appear that the separate use applies not only to the income accruing during the *coverture*, but to the life estate, or absolute reversionary interest, the *feme* may aliene the whole life estate, or absolute reversionary interest (*a*). The question in these cases is one of construction only, and therefore if the fund be settled upon trust for a *feme covert* “absolutely,” and “during her life for her separate use,” her power does not extend beyond the life estate (*b*). But if personalty be limited to the separate use upon a mere contingency (as on the insolvency of the husband, an event which has not yet occurred), it seems that the *feme covert* cannot, *pending the contingency*, aliene or otherwise dispose of her possible interest (*c*). [But since the Married Women's Property Act, 1882, as to cases falling within that Act, a married woman can dispose of a contingent interest (*d*).]

48. **Separate use in reference to real estate.** — As regards *realty* it was formerly held that the *feme covert* could not by virtue of the separate use, if there were no express power, dispose of the freehold, at least not for any larger interest than during her life (*e*), for between real and personal estate

[*(A)* *Weldon v. De Bathe*, 14 Q. B. D. 339.]

(*a*) *Sturgis v. Corp*, 13 Ves. 190; *Stead v. Nelson*, 2 Beav. 245; *Hanchett v. Briscoe*, 22 Beav. 503; *Stamford, Spaulding and Boston Bank v. Ball*, 10 W. R. 196; 4 De G. F. & J. 310; *Dudley v. Tanner*, W. N. 1873, p. 75.

(*b*) *Hanchett v. Briscoe*, 22 Beav.

496; *Crosby v. Church*, 3 Beav. 485; [but see 45 & 46 Vict. c. 75.]

(*c*) *Mara v. Manning*, 2 Jon. & Lat. 311; *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 549; S. C. Ib. 349; *Keays v. Lane*, 3 Ir. Eq. 1; and see *Luther v. Bianconi*, 10 Ir. Ch. Rep. 194; *Re Shakespear*, 33 W. R. 744; 30 Ch. D. 169.

[(*d*) 45 & 46 Vict. c. 75, ss. 1, 2, 5.]

(*e*) *Churchill v. Dibben*, 2 Lord

it was said there was this distinction, that on the death of the *feme* in her husband's lifetime, the absolute interest in the personal estate would devolve on the husband, but the inheritance of the real estate would descend upon the heir, who was not to be disinherited but in some formal mode. However, the favour shown anciently to the heir has in later times been disregarded; and at the present day, if lands be conveyed to a trustee and his heirs upon trust as to the *fee simple* for a *feme covert* "for her separate use," she may deal with the fee as if she were a *feme sole*. It is simply a question of intention. A married woman may have limited to

her a power of disposition over a *fee simple* estate, [\*780] and if it appear clearly \*that the separate use was meant to extend to the fee, she ought upon principle to be able to deal with the absolute property by virtue of the separate use, whether by act *inter vivos*, or by testamentary instrument, as fully as she might in the case of personal estate (a). And so it has now been decided both in Ireland and England (b). But the *feme covert* is not regarded as a *feme sole* in respect of the *fee simple*, unless it clearly appear

Kenyon's Rep. 2d part, 68, p. 84; case cited in Peacock v. Monk, 2 Ves. 192; and see 2 Rep. Husb. and Wife, 182, 2d ed.; 1 Sand. on Uses, 345, 4th ed.; Lechmere v. Brotheridge, 32 Beav. 353.

(a) Stead v. Nelson, 2 Beav. 245; Wainwright v. Hardisty, Ib. 363; Baggett v. Meux, 1 Coll. 138; 1 Ph. 627; see p. 628; Major v. Lansley, 2 R. & M. 355. But see Newcomen v. Hassard, 4 Ir. Ch. Rep. 274; Harris v. Mott, 14 Beav. 169; Moore v. Morris, 4 Drew. 38.

(b) Adams v. Gamble, 11 Ir. Ch. Rep. 269; 12 Ir. Ch. Rep. 102; Bestall v. Bunbury, 13 Ir. Ch. Rep. 549; Hall v. Waterhouse, 6 N. R. 20; Atchison v. Lemann, 23 L. T. 302; Pride v. Bubbs, 7 L. R. Ch. App. 64; [Cooper v. Macdonald, 7 Ch. D. 288;] Re Smallman, 8 Ir. Eq. 249; Taylor v. Meads, 5 N. R. 348; S. C. 4 De G. J. & S. 597. In the last case the

solicitor of the defendants, the tenant for life, and infant remainderman, petitioned for payment of his costs out of the estate, on the ground of his lien, and by an order made in the cause (though the bill had been dismissed), it was declared that the petitioner, as solicitor employed by or on behalf of the defendants to defend the said cause, was entitled to a charge on the premises for the amount at which his costs should be taxed, including the costs of the application, and directions were given for the sale, with the approbation of the Court, of a competent part of the estate for raising the costs; *Ex parte* Marshall. Taylor v. Meads, M. R. 6 May, 1865. See Haymes v. Cooper, 33 Beav. 431; Bonser v. Bradshaw, 4 Giff. 260; Wilson v. Round, 4 Giff. 416; and see Allen v. Walker, 5 L. R. Ex. 187.

from the instrument itself, that the *fee simple*, and not the mere life estate, was limited to the separate use (c).

[The mere renunciation by an intended husband of his marital rights in his wife's realty is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee (d).

Under the recent Act (e), the whole interest in real estate given to a married woman belongs to her as her separate estate, and can be disposed of by her accordingly (f).

49. **Feme covert can bar an equitable entail.** — If a married woman be equitable tenant in tail in possession of real estate, which is settled to her separate use, she can under the provisions of the Fines and Recoveries Act bar the entail, with the concurrence of her husband (g), and the husband's power of concurring will not be affected by his bankruptcy (h); and in cases falling within the recent Act the concurrence of the husband is unnecessary (i).]

\*50. **Feme covert as protector.** — If a legal estate [\*781] be limited to a married woman for her life for her *sole and separate use*, without the interposition of a trustee, with remainder in tail, the wife is the *sole protector* of the settlement, and the husband's consent in barring the entail is not necessary (a).

51. It still remains to treat of *restraint of anticipation*.

**Clause restraining anticipation.** — The clause against the *feme's* anticipation is of comparatively modern growth. In *Hulme v. Tenant* (b) it was held that a limitation to the separate use simply did not prevent the *feme* from aliening. In *Pybus v. Smith* (c) great pains had been taken in framing the separate use, and the income was made payable as the

(c) *Troutbeck v. Boughey*, 2 L. R. Eq. 534.

[(d) *Dye v. Dye*, 13 Q. B. D. 147. But see *Rippon v. Dawding*, Amb. 565, in which case, however, the 7th sect. of the Statute of Frauds was not referred to, and see the observations of L. J. Turner in *Field v. Moore*, 7 De G. M. & G. 718, 719.]

[(e) 45 & 46 Vict. c. 75.]

[(f) As to the cases to which the Act applies see *ante*, p. 751 *et seq.*]

[(g) 3 & 4 Will. 4, c. 74, ss. 15, 40.]

[(h) *Cooper v. Macdonald*, 7 Ch. D. 288.]

[(i) See *supra*, notes (e), (f).]

(a) *Keer v. Brown*, Johns. 138; [and see 45 & 46 Vict. c. 75.]

(b) 1 B. C. C. 16.

(c) 3 B. C. C. 340.



*feme* should by writing *under her proper hand from time to time appoint*, but it was again decided that the *feme* could even then dispose of her interest. After this Lord Thurlow happened to be nominated a trustee of Miss Watson's settlement, and he directed the insertion of the words "*and not by anticipation*" (*d*), from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned.

52. **No particular form of words required to restrain anticipation.** — But although these words are now almost universally employed they are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument it is sufficient (*e*); as if there be a direction to pay the income to such persons *as the feme shall after it has become due appoint* (*f*), or for her sole separate and *inalienable* use (*g*); [or her receipt to the trustees is to be given after the rents shall become due from time to time (*h*).] But if the limitation be merely to the sole and separate use, or to pay *from time to time* upon her receipt under her own proper hand (*i*), or if the trust be to pay her upon her *personal appearance* (*j*), the *feme* is left at liberty to part with her interest, for such expressions are, as Lord Eldon observed, "only an unfolding of all that is implied in the gift to the separate use" (*k*). Where [\*782] a testator directs a daughter's share of his estate \* to be so settled that she may enjoy the income during her life for her separate use," the trust is *executory*, and the

(*d*) See *Jackson v. Hobhouse*, 2 Mer. 487; *Parkes v. White*, 11 Ves. 221.

(*e*) *Ross's Trust*, 1 Sim. N. S. 199; *Doolan v. Blake*, 3 Ir. Ch. Rep. 349, and cases cited Ib.

(*f*) *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 De G. M. & G. 597; *Estate of H. H. Molyneux*, 6 I. R. Eq. 411.

(*g*) *D'Oechsner v. Scott*, 24 Beav. 239; *Spring v. Pride*, 10 Jur. N. S. 876; S. C. 4 De G. J. & S. 395.

[(*h*) *Re Smith*, 51 L. T. N. S. 501.]

(*i*) *Ellis v. Atkinson*, 3 B. C. C. 565; *Clarke v. Pistor*, cited Ib. 568; *Brown v. Like*, 14 Ves. 302; *Acton v. White*, 1 S. & S. 429; *Witts v. Dawkins*, 12 Ves. 501; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp*, 13 Ves. 190; and see *Scott v. Davis*, 4 M. & Cr. 87; *Hovey v. Blakeman*, cited 9 Ves. 524.

(*j*) *Re Ross's Trust*, 1 Sim. N. S. 196.

(*k*) *Parkes v. White*, 11 Ves. 222.

Court will insert a clause against anticipation (*a*); and if upon marriage a fund be articulated to be vested in the wife and a co-trustee in trust for herself, but not to be disposed of *without the consent of both parties*, the wife cannot anticipate without the consent of the co-trustee (*b*).

**53. Effect before marriage of the clause against anticipation.**

— A widow may, after her husband's death (*c*), and a *feme sole* may, before marriage (*d*), dispose absolutely of a gift limited to her separate use, though coupled with words purporting to restrain her power of anticipation; and the principle is briefly this — that *wherever a person possessing an interest, however remote a possibility, is sui juris, that person cannot be prevented by any intention of the donor from exercising the ordinary rights of proprietorship*. The fund may be limited "in trust for the separate use of the *feme*," or "in trust for her, and in the event of her marriage, for her separate use," or "in trust for her separate use in the event of her marriage," without the gift of any estate independently of that contingency; but in all these cases the interest, whether *vested* or *contingent*, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property to which she either now is, or may eventually become entitled.

**54. The clause against anticipation will operate upon the marriage.** — It was formerly held by Sir L. Shadwell, that while the *separate use* took effect upon marriage (*e*), the *clause against anticipation* was nugatory (*f*). Lord Langdale, with more consistency, held that in the absence of alienation during discoveriture, both the *separate use* and also the *clause against anticipation* came into operation upon marriage (*g*). And it was so finally decided by Lord Cottenham on appeal (*h*).

(*a*) *Re Dunnell's Trusts*, 6 I. R. Eq. 322.

(*b*) *Hastie v. Hastie*, 2 Ch. D. 304.

(*c*) *Jones v. Salter*, 2 R. & M. 208.

(*d*) *Woodmeston v. Walker*, 2 R. & M. 197; *Brown v. Pocock*, *Ib.* 210; S. C. 2 M. & K. 189; and see *Massey v. Parker*, 2 M. & K. 174.

(*e*) *Davies v. Thornycroft*, 6 Sim. 420.

(*f*) *Brown v. Pocock*, 5 Sim. 663; *Johnson v. Freeth*, 6 Sim. 423.

(*g*) *Tullett v. Armstrong*, 1 Beav. 1.

(*h*) S. C. 4 M. & Cr. 390; and see *Sanger v. Sanger*, 11 L. R. Eq. 470.

55. It was also held in a case (i) before Sir L. Shadwell, that if a fund be vested in trustees upon trust to pay the proceeds to such persons and for such purposes as a *feme covert* shall, when and as they become due, appoint, but so as not to *charge or anticipate* the same, and in default of appointment to pay the same into the hands of the *feme* for her *separate use* (without the addition of any words [\*783] to restrain her *power of anticipation*), if \* the *feme covert* assign the life estate limited to her *in default of appointment*, it destroys the power, and the restriction upon the anticipation annexed to it is nugatory. Such a doctrine would have led to great inconvenience, as the precedents of the most approved conveyancers were known to have been frequently expressed in that form, and the decision after failing to secure the assent of other judges (a) was ultimately reversed on appeal (b). The substantial intention was taken to be, that the *payment* into her hands, as well as the *power* to appoint, was not to operate until the annual proceeds had become actually due.

[**Release of power of appointment.** — Where property was held in trust for a married woman for life for her separate use, without power of anticipation, and after her death for such persons as she should by will appoint, it was held by the Court of Appeal in Ireland, reversing the decision of the Judge of first instance, that she could, while under coverture, extinguish the power (c).]

56. **Absolute gift followed by restraint of anticipation.** — Where there is an absolute gift of bank annuities — *i.e.* of a perpetual annuity redeemable by the State, to a married woman, followed by a restraint against anticipation, she cannot aliene during coverture (d); and generally where property is given absolutely to a married woman, but clogged with a clause restraining anticipation, [and an intention is shown by the

(i) *Brown v. Bamford*, 11 Sim. 127.

(a) *Moore v. Moore*, 1 Coll. 54; *Harrop v. Howard*, 3 Hare, 624; *Harnett v. Macdougall*, 8 Beav. 187.

(b) 1 Ph. 620. The case of *Medley v. Horton*, 14 Sim. 222, was decided before the decision of the Vice-Chan-

cellor in *Brown v. Bamford* had been overruled, and cannot be considered as law.

[(c) *Heath v. Wickham*, 5 L. R. Ir. 285; 3 L. R. Ir. 376.]

(d) *Re Ellis's Trust*, 17 L. R. Eq. 409; [*Re Bown*, 27 Ch. D. 411.]

instrument giving the property that the income only is to be paid to her,] she cannot aliene either income or corpus during the coverture (*e*). [But where a testator gave the proceeds of a mixed fund of realty and personalty to trustees upon trust to invest *the residue* after payment of debts, funeral and testamentary expenses, and legacies in specified securities, and to pay the income to A. for life, and after her death (which occurred in the testatrix's lifetime) *to divide and pay the said residue* between B. and C., one of whom was a married woman, and there was a declaration that every gift to a married woman was to be for her separate use without power of anticipation, V. C. Bacon drew a distinction between a gift of a sum of money and of a fund producing income, and held that in that case the gift was equivalent to a gift of a sum of money, and that the \*re- [\*784]straint against anticipation would not prevent the married woman from receiving her share of the residue (*a*).

But this distinction has been disapproved of, and cannot be supported upon principle; and the true test as to whether a clause against anticipation is effectual, to prevent a married woman from requiring the payment or transfer of property given absolutely to her subject to such a restraint, is, whether upon the construction of the whole document the intention is or is not shown that the trustees should retain the property and pay the income to the married woman (*b*). But if the interest of the married woman is reversionary, a clause against anticipation, even though not effectual to interfere with her right to receive the property when it falls into possession, will be an effectual restraint so long as it is reversionary (*c*).

57. **Enlarging equitable entail into an equitable fee.** — A married woman cannot, by a deed acknowledged under the Fines and Recoveries Act, dispose of an interest in land as to which her anticipation is restrained (*d*). But where an equitable

(*e*) *Re Ellis's Trust*, 17 L. R. Eq. 412; [*Re Benton*, 19 Ch. D. 277; *Re Sarel*, 4 N. R. 321; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown*, *ubi sup.*]

[(*a*) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber*, 51 L. J. N. S.

Ch. 721; *Re Coombes*, W. N. 1883, p. 169.]

[(*b*) *Re Bown*, 27 Ch. D. 411.]

[(*c*) *Re Bown*, *ubi sup.*]

[(*d*) *Boggett v. Meux*, 1 Ph. 627; *Heath v. Wickham*, 3 L. R. Ir. 376. The Irish statute 4 & 5 William 4,

estate tail was limited to a married woman for her separate use, and it was also provided that the rents and profits were to be paid to her without power of alienation or anticipation, it was held that this did not prevent her from barring the entail and limiting the equitable fee to herself. For that was not an alienation so as to deprive herself of anything; it was not, strictly speaking, an alienation at all, except in a very wide sense of the term. It was what was always called an enlargement of the estate (*e*).

58. **Enlarging long term into a fee.**—So a married woman entitled to a long term for her separate use may, if the case falls within the Conveyancing and Law of Property Act, 1881, enlarge the term into a fee simple, notwithstanding her anticipation may be restrained (*f*).

59. **Restraint against anticipation not avoided by fraud.**—The clause against anticipation cannot be got over even in the case of deliberate fraud by the *feme covert*. Thus where a *feme covert*, by fraudulently suppressing the restraint on anticipation, obtained an advance on the mortgage of property limited to her separate use, it was held upon an [\*785] application by her that the \*property was protected against the mortgage by the clause restraining her anticipation (*a*).]

60. **Court could not discharge the clause against anticipation.**—Where the clause against anticipation had once attached, even a Court of equity [could not until a recent Act have] discharged it, though alienation [might have been] for the *feme covert's* own advantage (*b*). An estate so settled may, however, be subject to *paramount equities*, as for raising costs of suit, [or for ante-nuptial debts (*c*),] which may enable the

c. 92, s. 69, contains a clause which is not in the English Act, preventing alienation by a married woman where the settlement contains a valid restriction against anticipation. But this was considered by Lord Lyndhurst, L. C., in *Baggett v. Meux*, as an expression by the legislature of what was meant by the English Act.]

[(*c*) *Cooper v. Macdonald*, 7 Ch. D. 288.]

[(*f*) 44 & 45 Vict. c. 41, s. 65. (2)(i).]

[(*a*) *Thomas v. Price*, 46 L. J. N. S. Ch. 761; *Stanley v. Stanley*, 7 Ch. D. 589; *Cahill v. Cahill*, 8 App. Cas. 420, 427; see S. C. *nom.* *Cahill v. Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361.]

(*b*) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535.

[(*c*) *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; 45 & 46 Vict. c. 75, s. 19.]

Court to direct a sale (*d*); and in case of adultery by the wife may be dealt with by the Divorce Court under the provisions of 22 & 23 Vict. c. 61, s. 5 (*e*); and as a married woman whose anticipation is restrained may still employ a *solicitor* to defend her right to the separate use, the solicitor so employed may acquire a lien on the separate estate for his costs thereby incurred (*f*). However, in a recent case, where a married woman entitled to the income of a trust fund for her life with a restraint upon anticipation took proceedings for administration of the estate, which were dismissed with costs, Pearson, J., gave the trustees liberty to retain their costs out of the plaintiff's income, and said "that the restraint on anticipation was intended for the protection of a married woman outside the Court; it was not intended to enable her to do a wrong in the Court. The Court was not fettered by the restriction in the exercise of its powers as to costs.<sup>1</sup>"

[61. May now under 44 & 45 Vict. c. 41. — Now, by the Conveyancing and Law of Property Act, 1881, s. 39, the Court may, "notwithstanding that a married woman is restrained from anticipation, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

Applications under this section should be made by summons, and not on petition (*g*).

The Court must be satisfied that it will be for the benefit of the wife to accede to the application (*h*), and will not bind her interest where the object is to benefit the husband (*i*); but where a married woman, who was entitled to the income of a fund for her life for her separate use without power of anticipation, with remainder in the events which happened for her appointees by will, and in default of appointment for herself absolutely, had contracted debts and was being harassed by her creditors, the Court made an order binding

(*d*) *Fleming v. Armstrong*, 34 Beav. 109.

(*e*) *Pratt v. Jenner*, 1 L. R. Ch. App. 493.

(*f*) *Re Keane*, 12 L. R. Eq. 115; and see p. 780, note (*b*).

[(*g*) *Re Lillwall's Settlement Trusts*, 30 W. R. 243.]

[(*h*) *Re Flood's Trusts*, 11 L. R. Ir. 355.]

[(*i*) *Tamplin v. Miller*, 30 W. R. 422.]

<sup>1</sup> *Re Andrews*, 30 Ch. D. 159; and see *Re Prynne*, 53 L. T. N. S. 465.

the property (*j*). The Court has no power simply to remove the restraint; it can only bind the married woman's [\*786] interest in spite of the restraint, when a \* disposition is made of the property which the Court considers to be for her benefit (*a*).

Where the Court is satisfied by the evidence of the consent of the married woman, it will not require her separate examination (*b*).]

62. **Restraint of anticipation void for perpetuity.** — The restraint against alienation may also be *void for perpetuity*, as if a fund be settled on A.'s marriage upon himself for life, with a power to A. to appoint to his issue, A. cannot appoint to his daughters as the issue of the marriage for their sole and separate use *without power of anticipation*, for this would prevent alienation for more than a life in being, and twenty-one years, which the law does not allow (*c*).

[Where, in a post-nuptial settlement, the trusts were, after the death of the husband and wife and in default of appointment, for sons at twenty-one and daughters at twenty-one, or marriage, but the daughters' shares were for their separate use without power of anticipation, it was held that as to the daughters *in esse* at the time of the settlement the restraint against anticipation was valid (*d*). So the restraint on anticipation attached to the interests of the children of a woman who, at the date of the will creating the interests, was past child bearing, is valid (*e*).

63. **Election where property subject to the restraint.** — Opinions have differed as to whether a *feme covert* can be put

[(*j*) *Hodges v. Hodges*, 20 Ch. D. 749; *Sedgwick v. Thomas*, 48 L. T. N. S. 100.]

[(*a*) *Per Cotton, L. J., Re Warren's Settlement*, 52 L. J. N. S. Ch. 928; 49 L. T. N. S. 696.]

[(*b*) *Hodges v. Hodges*, 20 Ch. D. 749; but see *Musgrave v. Sandeman*, 48 L. T. N. S. 215.]

(*c*) See *Armitage v. Coates*, 35 Beav. 1, and the cases there cited; and *Re Teague's Settlement*, 10 L. R. Eq. 564; *Re Cunynghame's Settlement*, 11 L. R. Eq. 324; *Re Michael's*

*Trusts*, 46 L. J. N. S. Ch. 651; *Re Ridley*, 11 Ch. D. 645, in which case the late M. R. followed the previous decisions, though he at the same time expressed his disapproval of them; *Herbert v. Webster*, 15 Ch. D. 610, in which V. C. Hall expressed dissatisfaction with his own decision in *Re Michael's Trusts*.

[(*d*) *Herbert v. Webster*, 15 Ch. D. 610; and see *Wilson v. Wilson*, 4 Jur. N. S. 1076.]

[(*e*) *Cooper v. Laroche*, 17 Ch. D. 368.]

to her election to give up, or make compensation out of, property as to which her anticipation is restrained, and the authorities on the point are about evenly balanced; but on principle it would seem that the better opinion is that she cannot be called upon to elect (*f*).]

64. **Settlement of accounts.**—It has been held that a clause against anticipation, though applicable to the fund when raised, does not prevent a *feme covert* from *adjusting the amount* of the fund with the trustees (*g*).

\* 65. **Breach of trust.**—Compensation for a breach [\*787] of trust by a *feme covert* in respect of settled property cannot be enforced, even against a fund limited by the *same settlement* to her separate use without power of anticipation (*a*).

66. **Interest due but not payable.**—Interest accrues due *de die in diem*; but if the interest, though *due*, be not *payable* under the contract before a particular day, which has not arrived, the interest so accrued is not regarded in the light of arrears but of future income, and therefore the *feme covert*, if anticipation be restrained, has no power over it (*b*).

67. **Arrears of income.**—The clause against anticipation does not prevent the operation of the rule, that if the husband be allowed to receive the wife's income she or her personal representative cannot recover more than one year's income, if so much (*c*); and the contracts or other engage-

[*f*] See *Willoughby v. Middleton*, 2 J. & H. 344; *Smith v. Lucas*, 18 Ch. D. 531; *Robinson v. Wheelwright*, 6 De G. M. & G. 535; *Cahill v. Cahill*, 8 App. Cas. 420, 427; S. C. *nom. Cahill v. Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124; *Re Queade's Trusts*, 33 W. R. 816; 54 L. J. Ch. 786.]

(*g*) *Wilton v. Hill*, 25 L. J. N. S. Ch. 156; and in *Stroud v. Gwyer*, M. R. 27 April, 1865, it was ruled that Mrs. Heath, whose share was settled by the will for her separate use without power of anticipation, was bound by a settlement of accounts which had been executed by

her. M. S. And see *Derbyshire v. Home*, 3 De G. M. & G. 113.

(*a*) *Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M'Gill*, 8 W. R. 290; *Sheriff v. Butler*, 12 Jur. N. S. 329; *Arnold v. Woodhams*, 16 L. R. Eq. 29. See, however, the observations of M. R. (but which were extrajudicial) in *Davies v. Hodgson*, 25 Beav. 186. As to breaches of trust by *femes covert*, see further, *ante*, p. 768.

(*b*) *Re Brettell, Jollands v. Burdett*, 2 De G. J. & S. 79; 10 Jur. N. S. 340.

(*c*) *Rowley v. Unwin*, 2 K. & J. 138; see *ante*, p. 776.



ments of the wife, which would affect her separate use generally, may be enforced against arrears already accrued, and which consequently have become emancipated from the clause against anticipation (*d*).

[68. **Restraint of anticipation unaffected by the late Act.**—The 19th section of the Married Women's Property Act, 1882, provides that nothing in the Act "shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman" (*e*); and it is apprehended that the effect of this clause is to prevent property acquired by a married woman after entering into an engagement, but as to which her anticipation is restrained, from being bound under sect. 1 of the Act, although the coverture may have determined before the date of the judgment founded on the engagement (*f*).

**Except as to antenuptial debts.**—The section further provides that no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage; and having regard to this clause, judgment against a married woman should be so worded as not to [ \*788 ] exclude its \*operation against property subject to a restraint on anticipation, where such restraint arises under a settlement made by herself (*a*).

69. A restraint on anticipation in a settlement will not prevent a married woman from exercising any power given to her as tenant for life, or as a person having the powers of a tenant for life by the Settled Land Act, 1882 (*b*).]

70. **33 & 34 Vict. c. 93.**—By the Married Women's Property Act, 1870, it was enacted:—

S. 1. That the *wages and earnings* of any married woman acquired or gained after the passing of the Act, *9th August*,

(*d*) *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; *Moore v. Moore*, 1 Coll. 54.

[(*e*) 45 & 46 Vict. c. 75.]

[(*f*) *Myles v. Burton*, 14 L. R. Ir. 258.]

[(*a*) *Bursill v. Tanner*, 13 Q. B. D. 691; see *ante*, p. 772.]

[(*b*) 45 & 46 Vict. c. 38, s. 61

(*b*).]

1870, in any employment, occupation or *trade* in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed and taken to be property held and settled to her separate use (c).

S. 2. That any *deposit* made or *annuity* granting by the commissioners for the reduction of the national debt after the passing of the Act, in the name of a married woman, or a woman who might marry after such deposit or grant, should be deemed to be her separate property.

S. 3. That any married woman, or any woman about to be married, might cause any sum in the *public stocks or funds*, and not being less than 20*l.*, to which she was entitled, or which she was about to acquire, to be transferred into the books of the Governor and Company of the Bank of England to, or made to stand in her name or *intended name* to her separate use, which should thenceforth be deemed her separate property (d).

\* S. 4. 33 & 34 Vict. c. 93. — That any married [\*789] woman, or woman about to be married, might cause any fully paid up *shares*, or any *debenture or debenture stock*, or any *stock* of an incorporated or joint stock company, to

[(c) In *Ashworth v. Outram*, 5 Ch. D. 923, 939, Lord Coleridge commenting upon this section, observed, "It clearly means to protect the wages and earnings gained or acquired by a woman while married in any employment or trade carried on separately from her husband. It seems to me the Vice-Chancellor was justified in finding as a fact that this person was engaged in an 'employment, occupation or trade,' after the marriage separately from her husband, and the wages and earnings acquired in such employment, occupation or trade, are admitted to be protected. But how far does this carry us? It seems to me that it must carry the protection, I will not say beyond the wages and earnings,

but it must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. Therefore, the effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband, for without the protection of the trade itself it is manifest that the protection of the wages and earnings of the trade is impossible;" and see *Lovell v. Newton*, 4 C. P. D. 7.]

(d) See *Re Bartholomew's Estate*, 23 L. T. N. S. 433; 19 W. R. 95; *Re Tanner's Trust*, W. N. 1874, p. 198; *Howard v. Bank of England*, 19 L. R. Eq. 295.

*the holding of which no liability was attached*, to be registered in the books of the company in her name or intended name to her separate use, which should thenceforth be deemed her separate property (a).

S. 5. That any married woman, or woman about to be married, might cause any share, benefit, debenture, right or claim in, to, or upon the funds of any *industrial and provident society*, or any *friendly society*, *benefit building society* or *loan society*, to the holding of which share, benefit, or debenture *no liability was attached*, to be entered in her name to her separate use, which should thereupon be deemed her separate property.

S. 7. That where any woman married after the date of the Act should during coverture become entitled to any *personal property as next of kin* (b), or any sum not exceeding 200*l.* under any *deed or will*, such property should belong to her for her separate use.

S. 8. That where any *freehold or copyhold property* should descend upon any woman married after the passing of the Act, the *rents and profits* (c) thereof should belong to her for her separate use.

S. 10. That a married woman might effect a *policy of insurance* upon her *own life*, or the *life of her husband* for her separate use, and that a policy of insurance effected by any *married man* on his *own life*, and expressed upon the face of it to be for the benefit of his wife or his wife and children, should be deemed a trust for the benefit of the wife for her separate use, and of the children; [and that when the sum secured by the policy should become payable, or at any time previously, a trustee thereof might be appointed by the Court of Chancery, or the Judge of the County Court of the district in which the insurance office was situated, and

(a) See *The Queen v. Carnatic Railway Company*, 8 L. R. Q. B. 299.

(b) The amount coming to her as next of kin appears to be without limit; [so now decided *Re Voss*, 13 Ch. D. 504.]

[(c) As the rents and profits here mentioned are not limited to those arising during the life of the married woman, it may be open to question whether this provision does not bind the corpus of the property, see *Re Voss*, 13 Ch. D. 504.]

that the receipt of such trustee should be a good discharge (d).]

\*S. 12. 33 & 34 Vict. c. 93. — That a husband [\*790] should not by reason of any marriage after the passing of the Act be liable for the *debts of his wife contracted before marriage* (a), and that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy such debts, as if she had continued unmarried (b).

[(d) Upon an application under this section the Court declared the rights and interests of the wife and children of the deceased, and directed a proper settlement of the fund; *Re Mellor's Policy Trusts*, 7 Ch. D. 127. In this case a husband effected a policy on his own life under the Married Women's Property Act, for the benefit of his wife and children, but the interest they were to take was not expressed on the face of the policy. On an application to the Chancery Division by the widow and children (who were two daughters) V. C. Malins at first appointed two trustees of the policy monies, and "declared that they were to hold the monies when received upon trust to pay thereout the costs, and to invest the residue in securities authorized by the court, and to pay the income to the widow for life for her separate use without power of anticipation, with remainder (as to both capital and income) for the children on attaining 21 or marriage under that age in equal shares, and if but one the whole for that one, with remainder (as to both capital and income) if neither child attained 21 or married under that age for the widow absolutely." But on a subsequent application in the same matter, 7 Ch. D. 200, the V.C. held that the section did not prevent a woman whose husband was dead from taking a share of the capital with the sanction of the Court, and he directed the policy monies to be distributed as in the

case of an intestacy. But this case has been disapproved of in *Re Adam's Policy Trusts*, 23 Ch. D. 525, where Chitty, J., held that the Court had no jurisdiction under this section to do more than make an order appointing a trustee, and intimated an opinion that a policy by a husband under this section "for the benefit of his wife and children," should be read in conjunction with the section, and that the proper construction was, by virtue of the words "separate use" in the section, for the benefit of the wife for her life with remainder to the children as joint tenants. It is doubtful whether since the Act of 1882, this section now remains in force for any purpose (see sect. 11 of that Act, *post*) and where the appointment by the Court of a new trustee is required, the petition should be entitled also in the matter of the Trustee Act, and in the matter of the Act of 1882, *Re Soutar's Policy Trusts*, 26 Ch. D. 236.]

(a) See *Conlon v. Moore*, 9 I. R. C. L. 190. [If the husband survive the wife and takes out administration to her estate, he will, notwithstanding this section, be liable to the extent of her assets to the wife's antenuptial debts; *Turner v. Caulfield*, 7 L. R. Ir. 347; and these debts will be payable *pari passu* out of the wife's separate estate and her general personal estate, S. C.]

(b) The separate property will be made available for payment of the debts [even although anticipation be

[71. 37 & 38 Vict. c. 50.—By the Amendment Act of 1874 (*c*), as to marriages which took place after the 30th July, 1874, by the 1st sect. the liability of the husband was restored, but by the subsequent sections his liability is to be confined to the extent of the fortune of the wife received, or which ought to have been received, by him, if he pleads that limit to his liability; but it is in the option of the husband either to claim this limit to his liability or not, and if he do not so claim it, he will be liable for the wife's debts in the same manner as the husband originally was at common law. It follows, that where the case falls under the Act of 1874, in a statement of claim by a creditor of the wife against the husband and wife it is not necessary for the plaintiff to allege that the husband has received or with reasonable diligence might have received assets of the wife, [\*791] \* but the husband if he intends to rely upon the Act must claim the benefit of it in his defence (*a*).

72. The Married Women's Property Act, 1870, and the Amendment Act of 1874, have now been repealed by the Married Women's Property Act, 1882, but without prejudice to "any act done or right acquired while either of such Acts were in force, or any right or liability of any husband or wife, married before the 1st January, 1883, to sue or be sued under the provisions of the repealed Acts, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued" before that date (*b*). It will therefore still be necessary in many cases to refer to the provisions of the repealed Acts.

[73. 45 & 46 Vict. c. 75.—By the Married Women's Property Act, 1882, it is in effect enacted:—

S. 1. subs. (5). That every married woman carrying on a trade separately from her husband shall, in respect of her

restrained, London and Provincial Bank *v.* Bogle, 7 Ch. D. 773;] but the *feme covert* herself cannot be made a bankrupt, *Ex parte* Holland, 9 L. R. Ch. App. 307, [unless she be trading separately from her husband, 45 & 46 Vict. c. 75, s. 1].

[(*c*) 37 & 38 Vict. c. 50.]

[(*a*) See *Matthews v. Whittle*, 13 Ch. D. 811. The liability of the husband ceases on the death of the wife; *Bell v. Stocker*, 10 Q. B. D. 129.]

[(*b*) 45 & 46 Vict. c. 75, s. 22.]

separate property, be subject to the bankruptcy laws as if she were a *feme sole* (c).

S. 3. That any money or other estate of the wife lent by her to her husband shall be treated as assets of his estate in case of his bankruptcy, she being entitled to a dividend as a creditor for the amount or value of such money or estate after all claims of the other creditors for valuable consideration have been satisfied.

S. 6. That all deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, at the commencement of the Act (1st January, 1883), are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act are standing in her *name* (d), shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that such property is standing in the sole name of a married woman

\*shall be sufficient *prima facie* evidence that she is [\*792] beneficially entitled thereto for her separate use, so as to empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify persons mentioned in the Act in respect thereof.

S. 7. That all such deposits, annuities, sums, shares, stock, debentures, debenture stock, and other interests as referred to in the last section, which after the commencement of the Act shall be allotted to or made to stand in the sole name of

[(c) As to the position before the Act of a married woman in regard to the bankrupt law; see *Ex parte Jones*, 12 Ch. D. 484.]

[(d) This is apparently an error for "*sole name*."]

a married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable.

But nothing in the Act is to require or authorise any corporation or company to admit any married woman to be a holder of any shares or stock therein, to which any liability may be incident, contrary to the provisions of the instrument regulating such corporation or company.

S. 8. That the provisions of sects. 6 and 7 shall apply, so far as relates to the estate, right, title, or interest of the married woman, to any deposits, &c., in the name of any married woman jointly with any persons or person other than her husband.

S. 9. That it shall not be necessary for the husband of any married woman in respect of her interest to join in the transfer of any deposit, &c., affected by the 6th, 7th, or 8th sects.

S. 11. That a married woman may effect a policy upon her own life or the life of her husband for her separate use.

And that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named. And that the insured may by the policy, or by any memorandum, appoint a trustee or trustees of the monies payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the policy monies; and that in default of any such appointment such policy shall vest in the insured in trust for the purposes aforesaid. If, at any time, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees the appointment may be made by any Court having jurisdiction under the Trustee Act, 1850, or the Acts amending the same.

\*S. 13. That a woman after her marriage shall [\*793] continue liable to the extent of her separate estate for her ante-nuptial debts, contracts, or wrongs, and may be sued accordingly, and all sums recovered against her shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be primarily liable.<sup>1</sup>

S. 14. That a husband shall be liable for his wife's ante-nuptial debts, contracts and wrongs, to the extent of her property which he shall have acquired or become entitled to, from or through his wife, after deducting payments made by him, and sums for which judgment may have been recovered against him, in respect of such debts, contracts, or wrongs (a).

S. 15. That a husband and wife may be jointly sued in respect of any such debt or liability if the plaintiff shall seek to establish his claim against both of them.

S. 21. That a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren (b) as the husband is now by law subject to for the maintenance of her children and grandchildren: provided that nothing in the Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Various other important provisions of the Act are incorporated into this work in places which seemed convenient. For the provisions of minor importance the Act should be referred to.

74. **Agricultural Holdings Act.**—The Agricultural Holdings (England) Act, 1883 (c), enacts in sect. 26, that “a woman married before the commencement of the Married

[(a) It will be observed that the language of the 14th section, the effect of which is given shortly in the text, differs materially from that of the Act of 1874, and *Matthews v. Whittle*, 13 Ch. D. 811, has no application to a case under the Act of 1882.]

[(b) The corresponding section in the Act of 1870, did not include grandchildren, *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615.]

[(c) 46 & 47 Vict. c. 61.]

<sup>1</sup> Under this section a husband cannot maintain an action against his wife for money lent to her or money paid for her before their marriage at her request. *Butler v. Butler*, 14 Q. B. D. 831.



Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall for the purposes of this Act be in respect of land as if she were unmarried." And that "where *any other woman* married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite," and she is to be separately examined by the County Court, or by the Judge of the County Court, for the place, where she for the time being is.

[\*794] \* The words "any other woman" here used are inaccurate, but are apparently intended to apply to a woman who does not under the preceding clause acquire the powers of an unmarried woman. It is, however, conceived that there is nothing in the section empowering a married woman whose anticipation is restrained to bind her interest.

By the same section the County Court is empowered to appoint, and change or remove any next friend of a married woman required for the purposes of the Act (a).]

## SECTION VII.

### OF JUDGMENTS AGAINST THE CESTUI QUE TRUST.

**Writs of execution at common law.** — Before entering upon this topic, it may be useful to notice briefly how *legal* interests stand affected by judgments.

1. At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant: the *feri facias*, to levy the debt *de bonis et catallis*; and the *levari facias*, to levy it *de terris et catallis* (b). The execution under the latter writ, however, embraced no interest in *land* of a higher description than a mere chattel interest, and affected not the *possession* of the lands (c), but merely enabled the sheriff, besides taking the chattels, to

[(a) 46 & 47 Vict. c. 61, s. 26.]

(b) Finch's Law, 471.

(c) *Ib.*; Sir E. Coke's case, Godb.

290.

levy the debt from the present profits, as from the rents payable by the tenants (*d*), and the emblements (*e*), that is, the corn and other crops at the time growing on the lands (*f*). If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in like manner (*g*) (1).

\* 2. **Statute of Westminster.** — In order to provide [\*795] for the creditor a more effectual remedy, the Statute of Westminster (*a*) introduced the writ of *elegit*, and enacted, that when the debt was recovered or knowledged, or damages awarded, the suitor should at his *choice* (whence the term *elegit*) have a writ of *feri facias* (*b*), from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and *one-half of his land, until the debt should be levied upon a reasonable price or extent*. It was by virtue of this statute that judgment creditors were first enabled to sue execution of *one moiety* of the debtor's *lands*, whether

(*d*) Finch's Law, 472; Davy v. Pepys, Plowd. 441.

(*g*) F. N. B. 265.

(*a*) 13 Ed. 1, st. 1, c. 18.

(*e*) 4 Com. Ab. 118.

(*b*) This includes the writ of *levari*

(*f*) Harbert's case, 3 Rep. 11 b.; *facias*; 2 inst. 395.

2 Inst. 304; 2 Bac. Ab. Execution

(C) 4, note (*b*).

(1) There was also another species of *levari facias*, of which the plaintiff might under particular circumstances, have indirectly availed himself. In case the defendant was *outlawed* in the action, the sheriff, on the issuing of the *capias utlagatum*, took an inquisition of the lands of the debtor, and extended their value, and made his return to the *Exchequer*. A *levari facias* from the Crown then followed, commanding the sheriff to levy the extended value *de exitibus*, from the *issues* of the lands, till the plaintiff should be satisfied his debt. These issues were defined to be the "rents and revenues of the land, corn in the grange, and all moveables, except horses, harness, and household stuff;" 13 Ed. 1, c. 39, st. 1; 2 Inst. 453. The sheriff might have agisted or mown the grass; *Britten v. Cole*, 5 Mod. 118, *per* Lord Holt. But if at the date of the inquisition, the agistment was already let, the money agreed to be paid was a sum *in gross*, and was not subject to the *levari facias*; S. C. 1 Raym. 307, *per eundem*. The cattle of a stranger, if *levant and couchant* on the land, were seizable under the writ, as included in the word "issues"; S. C. Ib. 305. The lands were bound by the *levari facias* from the date of the writ, so that any subsequent disposition, though it served to pass the freehold and possession, yet did not interrupt the king's title to the profits; Ib. 307, *per* Lord Holt.

vested in him at the time of the judgment or subsequently acquired.

[**Levari facias abolished in civil proceedings.**— Now by the Bankruptcy Act, 1883 (c), it is enacted that (1), The sheriff shall not under a writ of *elegit* deliver the goods of a debtor nor shall a writ of *elegit* extend to goods; and (2), No writ of *levari facias* shall hereafter be issued in any civil proceeding.]

We now come to the inquiry, what is the effect of judgments upon *equitable* interests.

1. **Fieri facias as regards trusts.**— With respect to the *feri facias*, it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpœna*. During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced more liberal principles, and established, what is now law, that a creditor who is prevented from executing the legal process by the interposition of a trust, may come into Chancery, and prosecute an *equitable fieri facias* (d).

2. **Trusts not bound by it before execution sued out.**— But, as the analogy to law must be strictly pursued, the trust of a chattel could never have been attached in equity [\*796] until the *writ of execution* was actually sued out; for till that time there was no *lien* upon the debtor's effects, which was the very ground of the application (a).

3. **Nor where the legal estate is not liable.**— And as equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel of which the trust has been created, is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of

[(c) 46 & 47 Vict. c. 52, s. 146.]

(d) Pit v. Hunt, 2 Ch. Ca. 73; Anon. case, cited 1 P. W. 445; and see Scott v. Scholey, 8 East, 485; Estwick v. Caillaud, 5 T. R. 420; Kirkby v. Dillon, C. P. Cooper's Rep. 1837-38, 504; Simpson v. Taylor, 7 Ir. Eq. Rep. 182; Bennett v. Powell,

3 Drew. 326; Gore v. Bowser, 3 Sm. & G. 1; Smith v. Hurst, 1 Coll. 705; Partridge v. Foster, 34 Beav. 1; Horsley v. Cox, 4 L. R. Ch. App. 92.

(a) Angell v. Draper, 1 Vern. 399; Shirley v. Watts, 3 Atk. 200; Smith v. Hurst, 1 Coll. 705; Partridge v. Foster, 34 Beav. 1.

Horn v. Horn in Ambler (*b*), that a trust of *stock* might, before the late Act, have been taken by a judgment creditor in equitable execution; and Taylor v. Jones (*c*), before Sir W. Fortescue, M. R., was even a decision to the same effect; but such a doctrine, inasmuch as stock could not have been reached at law, was clearly contrary to all principle, and afterwards incurred the express disapprobation of Lord Thurlow (*d*), Lord Manners (*e*), Sir W. MacMahon (*f*), Sir Archibald Macdonald (*g*), and Lord Eldon (*h*); Lord Thurlow observing, that the opinion in Horn v. Horn was so anomalous and unfounded, that forty such would not satisfy his mind (*i*). However, by the late Act (*j*) various descriptions of property, formerly exempt, are now liable to be taken in execution, and the remedy of the creditor in equity must be deemed to be enlarged accordingly (*k*); and the same statute provides a special procedure for reaching a judgment debtor's interest in *stock*, whether legal or equitable (*l*).

4. **Equity of redemption.**—The judgment creditor is entitled to the like relief against the *equity of redemption of a chattel*, as against any other equitable interest in a chattel (*m*).

5. **Whether equity can adopt the *elegit* by analogy.**—The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a Court of equity can consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example, was by Act of Parliament made forfeitable without inquest for treason, and, as the Statute enumerated "*uses*," it was contended, and seems to be \*the better [\*797]

(*b*) Amb. 79.

(*c*) 2 Atk. 600.

(*d*) Dundas v. Dutens, 2 Cox, 240; and see a note of S. C. in Grogan v. Cooke, 2 B. & B. 233.

(*e*) Grogan v. Cooke, 2 B. & B. 233.

(*f*) Plasket v. Dillon, 1 Hog. 328.

(*g*) Caillaud v. Estwick, 2 Anst. 384.

(*h*) Rider v. Kidder, 10 Ves. 368.

(*i*) See 2 B. & B. 233.

(*j*) 1 & 2 Vict. c. 110, s. 12.

(*k*) See cases p. 80, note (*b*); and see Stokoe v. Cowan, 29 Beav. 637.

(*l*) See *infra*, p. 806.

(*m*) King v. Marissal, 3 Atk. 192; Shirley v. Watts, *Ib.* 200; Burdon v. Kennedy, *Ib.* 739; Thornton v. Finch, 4 Giff. 515; and see King v. De la Motte, For. 162.

opinion (*a*), that *trusts* also under that expression became forfeitable to the Crown; but it was never suggested that, had "uses" not been inserted in the Act, a Court of equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. But the Act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, admitted *entails* and remainders of trusts, why might it not, by analogy to another Act of the same statute, allow equitable interests to be affected by *judgments* (*b*)?

6. **Trusts formerly not subject to *elegit*. Secus now.**—It would seem that in Lord Keeper Bridgman's time a trust was not subject to an *elegit* (*c*). But it was long ago established that a judgment creditor might redeem a mortgage in fee (*d*), and it is now equally well settled that he may prosecute his *elegit* against any other equitable interest (*e*).

7. **Land to be converted into personalty not bound by a judgment.**—An estate given by A. to trustees *upon trust to convert* into personalty for the benefit of B. has in equity all the properties of *personalty*; and even under the *old law* therefore, a judgment against the person to whom the pro-

(*a*) See *infra*, p. 818.

(*b*) See *Ryall v. Rolle*, 1 Atk. 184.

(*c*) See *Pratt v. Colt*, Freem. 139.

(*d*) *Greswold v. Marsham*, 2 Ch. Ca. 170; *Crisp v. Heath*, 7 Vin. Ab. 52. (The former case has been compared with Reg. Lib., A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found.) *Plucknet v. Kirk*, 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184, see *infra*; *Sharpe v. Earl of Scarborough*, 4 Ves. 538, and the cases cited *Ib.* 541; *Stileman v. Ashdown*, 2 Atk. 477; *Fothergill v. Kendrick*, 2 Vern. 234; and see *Steele v. Philips*, 1 Beat. 188; *Forth v. Duke of Norfolk*, 4 Mad. 503; *King v. De la Motte*, Forr. 162; *Freeman v. Taylor*,

3 Keb. 307; *Hatton v. Haywood*, 9 L. R. Ch. App. 229.

(*e*) *Tunstall v. Trappes*, 3 Sim. 286; *Forth v. Duke of Norfolk*, 4 Mad. 504, per Sir J. Leach; Serj. Hill's opinion, *Ib.* 506, note (*a*); *Foster v. Blackstone*, 1 M. & K. 311, per Sir J. Leach; and see *Lodge v. Lyseley*, 4 Sim. 70; *Kirby v. Dillon*, C. P. Cooper's Rep. 1837-38, 504; *Neate v. Duke of Marlborough*, 9 Sim. 60, 3 M. & Cr. 407; *Adams v. Paynter*, 1 Coll. 530; *Lewis v. Lord Zouche*, 2 Sim. 388. *Davidson v. Foley*, 2 B. C. C. 203; 3 B. C. C. 598; and *Plasket v. Dillon*, 1 Hog. 324 (commonly cited upon this subject), were cases of a *legal elegit*, and the judgment creditor was seeking to remove an impediment to the *legal execution* of it.

ceeds of the sale were directed to be paid conferred no lien upon the proceeds (*f*).

8. **Judgment against vendor, after contract to sell.** — Whether the same principle applied where a judgment was entered up against a person after he had *contracted to sell* real estate was much doubted.

**Serjeant Hill's opinion.** — Upon this subject we have the following opinion of Mr. Serj. Hill: — H. A. S., seised in fee of an estate, subject to his mother's jointure and to younger children's portions, *contracted for the sale* of the property in lots to different purchasers. After the date of \* the contract, H. A. S. executed a conveyance to [\*798] trustees, upon trust to convey to the different purchasers, and to invest part of the purchase money in the funds as an indemnity against the jointure and portions and to pay the residue to himself. *Subsequently to the deed of trust* H. A. S. acknowledged a judgment. Mr. Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they *had notice*, and also as against judgments, if any, of which they *had no notice*. The opinion was as follows: "As to the judgment of which the trustees *had notice*, though, to many purposes, the estate agreed to be sold is from the time of the contract the estate of the purchaser; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase money; and, therefore, the judgment creditor hath a right to so much of the purchase money as is sufficient to satisfy the judgment; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have *no notice*, I think a Court of equity will not make them pay the money over again, if they apply it according to the deed of trust, because I think equity in the case of a judgment creditor and a *bonâ fide* purchaser or

(*f*) *Foster v. Blackstone*, 1 M. & K. 297; and see *Browne v. Cavendish*, 1 Jon. & Lat. 633.

a trustee without notice, will not interpose on either side, but will leave the law to take its course" (a).

**Sir J. Leach's opinion.** — And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract was bound by a judgment; for in *Forth v. The Duke of Norfolk* (b), where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said, "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he had notice of it before the consideration was paid*. If A., before the actual conveyance to him, had received notice of the judgment, then, being a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase money, he would have been equally affected with the judgment as the debtor himself: and if he had afterwards paid the whole purchase money to the debtor, he would have still remained liable to the judgment creditor."

[\*799] **\* Dictum of Sir L. Shadwell.** — But in a subsequent case Sir L. Shadwell said "he should not have given the opinion which the learned Serjeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him at that time, the purchasers had a right to file a bill against him and have the legal estate conveyed" (a). And it may be argued that if the vendor die after the contract, but before the conveyance the purchase money would go to the executor (b); and that if the contract work a notional conversion of the land into money in respect of the vendor's representatives, the same consequence ought to follow in respect of the vendor's judgment creditors.

9. **Whether in case of conveyance upon trust to sell or mortgage, with power of sale, surplus proceeds are bound by a judgment.** — The case became still more difficult where A. con-

(a) Cited *Forth v. Duke of Norfolk*, 4 Mad. 506, note (a).

(b) 4 Mad. 503.

(a) *Lodge v. Lyseley*, 4 Sim. 75; and see *Craddock v. Piper*, 14 Sim. 310, where, however, it does not ap-

pear whether the judgments were entered up before the actual sale or the decree for sale.

(b) See *Farrar v. Winterton*, 5 Beav. 1; *Curre v. Bowyer*, Ib. 6, note.

vayed to trustees upon trust to sell for the discharge of incumbrances, and to pay the surplus to *himself*, and before sale, a judgment was entered up against A. (c); or where a mortgage was given with power of sale to the mortgagee and a judgment was entered up against the mortgagor before sale (d). It was clear that in either case the power of giving receipts was binding as against the judgment creditor, so that a purchaser from the trustee or mortgagee was not concerned to see that the judgments were satisfied (e); but this still left open the question whether the judgment was or not a lien or charge on the proceeds in the hands of the mortgagee or trustee.

10. **How much of the estate may be taken in execution.**—The question whether under the old law, the *lien* of the judgment creditor extended to the *whole* or a *moiety* of the trust estate was also one of considerable difficulty, and the authorities can only be reconciled by the aid of a somewhat subtle distinction.

**On what grounds a judgment creditor may apply to a Court of equity.**—A judgment creditor might have come into a Court of equity upon two grounds. *First*, upon a *legal* title, where he either sought to remove an impediment to the execution of his legal *elegit*, or, after the death of the conusor, sued for payment of his debt out of the conusor's personal assets, and, if they should be insufficient, then by sale (f) of the real estate; or, *Secondly*, upon an *equitable* \**elegit*, [\*800] on the ground that he had no legal *lien*, and therefore could have no legal process (a).

**Execution of a moiety only of a trust estate.**—As the extent

(c) See *Bayden v. Watson*, 7 Jur. 245; *Re Underwood*, 3 K. & J. 745.

(d) See *Wright v. Rose*, 2 S. & S. 323, and *Clarke v. Franklin*, 4 K. & J. 260.

(e) *Lodge v. Lyseley*, 4 Sim. 75; *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 513; *Drummond v. Tracy*, Johns. 608.

(f) An *elegit* would at law give the possession of the lands till the satisfaction of the debt, but equity assumes the jurisdiction of *falicitat*ing the remedy by a *sale*. See *Barne-*

*wall v. Barnewall*, 3 Ridg. 61; *O'Fallon v. Dillon*, 2 Sch. & Lef. 19; *O'Gorman v. Comyn*, Ib. 139; *Stileman v. Ashdown*, 2 Atk. 610; but see *Bedford v. Leigh*, 2 Dick. 709; *Neate v. Duke of Marlborough*, 3 M. & Cr. 417.

(a) These grounds of suit still subsist, in addition to that conferred by the 13th section of 1 & 2 Vict. c. 110, giving the judgment creditor a charge in equity. [See *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]



of relief ought in both these cases to be the same, and the Court never attempted to make a difference, the authorities determined upon either head may be relied upon as applicable to the other. The result of the cases upon this principle, notwithstanding an early authority to the contrary (*b*), appears to be that a judgment creditor could under the old law sue an equitable *elegit* of a moiety only of a trust estate (*c*).

11. **Execution of the whole of an equity of redemption.**—An equity of redemption was, however, governed by a different rule. If A., seised of an estate, mortgaged it to B. in fee, and then confessed a judgment to C., it was clear that C. had a *lien* which entitled him to redeem B. But should he redeem the whole or a moiety? So far as the judgment creditor had any claim of his own, a moiety only; but as B. could not be compelled to part with the smallest fraction of the estate until he had been satisfied his whole debt, C. was under the necessity of redeeming the entirety. Again, when C. had taken a transfer of the security, it followed, that as mortgagee with a judgment against the mortgagor he had a right to tack, and no one could redeem any part of the estate out of his hands until payment, not only of the original mortgage debt but also of the judgment. Thus it arose from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor was paid by a sale of the *whole* estate (*d*) (1).

(*b*) *Compton v. Compton*, cited in *Stileman v. Ashdown*, Amb. 15; Reg. Lib. A. 1711, f. 134. The authority of this case cannot, however, have much weight, for, as was observed by Lord Hardwicke, (*Stileman v. Ashdown*, Amb. 17,) the point whether the whole or a moiety should be sold appears not to have been discussed.

(*c*) *Stileman v. Ashdown*, 2 Atk. 477, 608; *Rowe v. Bant*, Dick. 150; Reg. Lib. B. 1750, f. 427; *Barnewall v. Barnewall*, 3 Ridg. P. C. 24; *O'Dowda v. O'Dowda*, 2 Moll. 483; *Anon case*, Ib.; *O'Gorman v. Comyn*, 2 Sch.

& Lef. 137; *Burroughs v. Elton*, 11 Ves. 33; *Williamson v. Park*, 2 Moll. 484; *Armstrong v. Walker*, Ib. In *O'Fallon v. Dillon*, 2 Sch. & Lef. 13, the sale of the estate was *not* confined to a moiety; but there the creditor had entered up *two* judgments the *same term*, and then as both judgments were of the same date, the creditor might at *law* have taken both moieties in execution. See *Attorney-General v. Andrew*, Hard. 23.

(*d*) *Stonehewer v. Thompson*, 2 Atk. 440; *Sish v. Hopkins*, Blunt's Amb. 793.

(1) It was ruled, upon a similar principle, that, where freeholds and copyholds were blended in one mortgage, the equity of redemption of the whole

\*In *Stileman v. Ashdown* (a), Lord Hardwicke, at [\*801] the same time that he gave a judgment creditor a moiety only of the *trust estate*, ordered a sale of the *whole* of the lands in *mortgage* (b). So, where there were several incumbrancers by judgment upon an equity of redemption, and the Court decreed a sale, the first judgment creditor was not confined to a moiety of the estate, but the decree was, that the incumbrancers should be paid their full demands out of the proceeds of the sale, according to their priority (c).

12. **Case of a trust by way of mortgage.** — There was one species of interest, which though bordering closely upon the nature of an equity of redemption, yet should perhaps have been distinguished from it. In *Tunstall v. Trappes* (d), Trappes, in 1811, appointed an estate to the use that Davis might receive an annuity, and subject thereto, to the use of Withy in fee upon trust, in case the annuity should be in arrear for six months, to sell the premises, and out of the proceeds to purchase an annuity of the same amount for Davis, and pay the surplus, after discharging the existing incumbrances, to Trappes; provided, that in case Trappes should be desirous of repurchasing the annuity, and should pay the price to Davis, then the annuity should cease, and Withy, the trustee, should reconvey. In 1812 Trappes confessed a judgment, and the question was, whether it should affect the whole or only a moiety of the estate; and Sir L. Shadwell, on the ground that a judgment creditor might redeem the entirety of lands in mortgage, held that the *lien* should extend to the whole. Now, there appears to be this distinction between an equity of redemption and the case just mentioned. In the former, the whole interest is in the mortgagee by non-fulfilment of the condition; and if the judgment creditor redeem the mortgagee, and then the mortgagor come to be relieved against the forfeiture, the Court will im-

(a) 2 Atk. 477.

(b) Sir A. Hart, not observing the ground of the distinction, has charged Lord Hardwicke with inconsistency, *Leahy v. Dancer*, 1 Moll. 322.

(c) *Sharpe v. Earl of Scarborough*, 4 Ves. 538; the cases cited *Ib.* 541; and see *Berrington v. Evans*, 3 Y. & C. 384.

(d) 3 Sim. 286, see 300.

was liable as assets to a bond creditor, though copyholds by themselves were not assets; *Acton v. Pierce*, 2 Vern. 480.

pose terms upon the mortgagor, and oblige him to discharge *every lien* upon the estate before he can be permitted to redeem the smallest part. But in *Tunstall v. Trappes* the whole interest was never in the annuitant either at law or in equity. The *legal* estate was limited to a third person in fee, and the *equitable* interest to the extent of securing the annuity only was in trust for the annuitant, but as to all the residue was in trust for the grantor. There was nothing to be redeemed, but merely a trust to be executed. The judgment creditor might take an assignment of the [\*802] \*annuity, but he had no right to tack the judgment: the grantor could call for a reconveyance from the trustee on payment of the price agreed upon for the annuity, and the Court could impose no terms, for no favour was asked.

13. **Execution of a trust estate by eligit at law, under Statute of Frauds.**— We come next to the provision in the 10th section of the Statute of Frauds (*a*), which enables a judgment creditor in certain cases to sue a writ of execution at law against an equitable estate.

The 10th section enacts in substance that it “shall be lawful for the sheriff to deliver execution unto the party suing of all such lands and hereditaments as any other person may be in any manner of wise *seised or possessed* in trust for the party against whom execution is so sued, like as the sheriff might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands and hereditaments of such estate as they are *seised* of in trust for him at the time of the said execution sued.”

14. **Construction of the Statute.**— Upon the construction of this section the following points have been resolved:—

*a.* As the statute, though using in one case the words *seised or possessed*, speaks elsewhere only of lands, &c., of which others are *seised* in trust for the debtor, it does not extend to trusts of chattels real of which the legal proprietor is said not to be *seised*, but *possessed* (*b*).

(*a*) 29 Car. 2, c. 3.

Scholey, 8 East, 467; Metcalf v.

(*b*) Lyster v. Dolland, 3 B. C. C.

Scholey, 2 Bos. & Pul. N. R. 461.

478; S. C. 1 Ves. jun. 431; Scott v.

β. An *equity of redemption* is not within the terms of the Act (c).

γ. A *bare and simple* trust only is intended — not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title (d).

δ. If after the judgment is entered up, but before actual execution, the estate has been disposed of to a purchaser, so that when execution is sued there is no trust for the debtor in *esse*, in that case the words of the statute fail to provide a remedy, and the judgment creditor cannot be put in possession (e).

**Whether equitable eligit may be had where no legal eligit of a trust under the Statute.** — The question has been much discussed whether in the last case, though the judgment creditor could not prosecute a *legal* execution, he might not subject the purchaser, if affected with notice, to an *\*equitable elegit (a)*. It was said, that as there was [\*803] no execution at law, and equity followed the law, the creditor was without redress; but in this argument the principle that equity followed the law seems to be wrongly applied. A judgment bound a *legal* estate, and, as equity followed the law, a judgment was therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an additional remedy by enabling the judgment creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law (b), and therefore the creation of a *legal* remedy in certain cases provided for by the Act could not preclude the judgment creditor from prosecuting his equitable *eligit* in other cases for which the statute had made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and covert it into a disabling statute. The difficulty in the way of the relief was

(c) *Lyster v. Dolland*, Scott v. Scholey, *Metcalfe v. Scholey*, *ubi supra*; *Burdon v. Kennedy*, 3 Atk. 739.

(d) *Doe v. Greenhill*, 4 B. & Ald. 684; *Harris v. Booker*, 4 Bing. 96; *Forth v. Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach.

(e) *Hunt v. Coles*, 1 Com. 226; *Harris v. Pugh*, 4 Bing. 335.

(a) See 2 Sugden's *Vend. & Purch.* 386, 10th ed.; Coote on *Mortg.* 3d ed. p. 53; 2 *Powell, Mortg.* 606.

(b) *Attorney-General v. Andrew*, *Hard.* 27; 2 *Inst.* 472.

said to be, that no instance of it could be found after the most diligent search. The reason probably was, that judgments had only in modern times been held to bind equitable interests at all; the doctrine was certainly not established before the Statute of Frauds. But the system of trusts had from that period downwards been gradually maturing, and the principles which governed uses, and were thence transferred into trusts, had since, not indeed been abandoned, but received a much more enlarged and liberal application, and as judgments were acknowledged to be *liens* upon equitable interests, the consequence necessarily followed that a purchaser was bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

15. We now proceed to an examination of the more recent statutes.

1 & 2 Vict. c. 110. — By the Act for extending the remedies of creditors (1 & 2 Vict. c. 110) it is enacted — (I.) By sect. 11, That execution at *law* may be had under an *eligit* of the *whole* lands freehold and copyhold, of which the debtor was seised or possessed at law or *in equity*, or over which he had a disposing power (*c*), *at or subsequently to the entering up of the judgment*. (II.) By section 13, That in *equity* a judgment

shall operate as a *charge* upon the whole of the lands  
 [\*804] \*freehold and copyhold of which the debtor was  
 seised or possessed at law or in equity, or over which  
 he had a disposing power, at or subsequently to the entering  
 up of the judgment, with a proviso that the creditor shall  
 not be entitled to proceed in equity to obtain the benefit of  
 such charge until after the *expiration of a year* from the date  
 of the judgment, and that the protection in equity of pur-  
 chasers for valuable consideration without notice shall not be  
 disturbed. (III.) By sect. 18, That *decrees and orders* of  
 Courts of Equity, *rules* of Courts of Common Law, &c.,  
 whereby any sum of money, or any costs, charges or ex-

(c) A trust for the separate use of a married woman is not an estate over which she has a disposing power within the meaning of the Act; *Digby v. Irvine*, 6 Ir. Eq. Rep. 149. Neither is the power of the settlor to

defeat a voluntary settlement by means of the 27 Eliz. c. 4, a *disposing power* within the Act of Vict.; *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507.

penses, shall be payable to any person, shall have the effect of judgments (a). But, (IV.) By sect. 19, That no *judgments, decrees, or orders*, shall affect real estate *by virtue of the Act*, unless and until they have been *registered* with the senior master of the Court of Common Pleas.

16. **Remarks on the Statute.** — It is observable upon these clauses, that an *equitable* estate, whether of freehold or copyhold tenure, and whether of freehold or leasehold interest, and without any restriction *to the time of execution sued*, as in the 10th section of the Statute of Frauds, is subjected by the Act to execution at *law* by writ of *elegit* (s. 11), and to *quasi* execution in *equity* by way of charge (s. 13). In the latter case purchasers without notice are expressly protected (s. 13), but in the former case not: a purchaser, therefore, even of an equitable interest, after the commencement of the Act, was obliged by this statute to search the registry at the Common Pleas for judgments entered up against the vendor, and that whether before or subsequently to the Act, for the time for entering up the judgments was immaterial, provided they had been registered. It may be thought anomalous and inconsistent that a purchaser should not be protected at *law* by want of notice, while he was in *equity*; but the intention of the legislature probably was, in giving a remedy both at law and in equity, not to disturb the principles upon which the respective Courts acted, and therefore if the trust was a *plain* one, and so amenable to a legal *elegit*, the judgment creditor might take the lands in execution even against a purchaser without notice; but if the trust was so complicated as to oblige him to apply to a Court of equity, and treat the judgment as a charge, the Court by the Act was not to disregard its established \* rules, but, [\*805] as in all other cases, was to protect a purchaser without notice.

17. The following cases have been decided upon this Act.

<p>(a) A decree for an account merely is not within the section; Chadwick v. Holt, 2 Jur. N. S. 918; [Widgery v. Tepper, 6 Ch. D. 364.] Neither is a rule of a Court of Common Law which does not specify the sum to be</p>	<p>paid; Jones v. Williams, 11 Ad. &amp; Ell. 175; Doe v. Amey, 8 M. &amp; W. 565; though, as respects costs, the case is different; Jones v. Williams, 8 M. &amp; W. 349; Doe v. Barrell, 10 Q. B. 531.</p>
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A. was entitled to an *annuity* secured by a covenant and an assignment of leaseholds in *trust to sell*, and it was held that A.'s interest under the deed might, under the Act, be made available for payment of a judgment debt due from her (a). A testator gave real estate to trustees upon trust to levy and raise, during the life of A., an *annuity* of 400*l.*, and directed the annuity to be held upon trust for the support, clothing, and maintenance of A., and the Court, having previously decided that the trust was one for the benefit of A. generally (b), held that a judgment creditor of A. was entitled to a charge on the annuity under the Act (c). A person covenanted to pay A. 5000*l.*, and that the sum should be a *charge* on certain land, and it was held that a judgment creditor of A. was entitled to a charge on the land in respect of A.'s interest therein (d). A mortgage was executed with a power of sale, and the surplus made payable to the mortgagor, his heirs, appointees, or assigns, and before a sale judgment was entered up against the mortgagor, who was subsequently discharged under the Insolvent Act, and after such discharge the mortgagee sold under the power of sale, and it was held that the judgment creditor was entitled to the *surplus proceeds* of sale (e). A. was tenant for life of one-third of a trust fund, which at the time was invested on *real securities*, and, it was held, though the trustees had a power of varying the securities, that A.'s interest was bound by the judgment (f). A *feme*, trustee for sale with a power of signing receipts, married, and then with the concurrence of her husband contracted to sell, and the purchaser objected that, as the *feme covert* was *beneficially entitled to one-third* of the produce, and the judgments were entered up, but after the contract, against the husband, the wife could not make a title; however, the Court held that the judgments could not

(a) *Harris v. Davidson*, 15 Sim. 128.

(b) *Youngehusband v. Gisborne*, 1 Coll. 400.

(c) S. C. 1 De G. & Sm. 209.

(d) *Russell v. McCulloch*, 1 K. & J. 313; and see *Clare v. Wood*, 4 Hare, 81. But by 18 & 19 Vict. c.

15, s. 11, when the mortgagee is paid off, the judgment against him ceases to bind the land.

(e) *Robinson v. Hedger*, 13 Jur. 846; 14 Jur. 784; 17 Sim. 183; and see *Thornton v. Finch*, 4 Giff. 515.

(f) *Avison v. Holmes*, 1 J. & H. 530.

neutralise or prejudice the power of sale and signing receipts (*g*). Where a testator devised an estate to his wife for life, with remainder upon trust to sell and *divide the proceeds* amongst the testator's sons for life, of whom James was one, it was held by V. C. Kindersley that \*the [\*806] share of James was not "any estate or interest in land" within the meaning of the statute (*a*). But it is observable, that of the several previous decisions one only (*Harris v. Davison*) appears to have been brought to the attention of the Court.

18. **Proviso against suing in equity until a year after judgment.**—The object of the proviso in *sect. 13, restraining the creditor from suing for a year*, is not obvious; but most probably the framers of the Act considered, that since he would obtain, as incident to his charge, a right to a sale in equity, while under the *elegit* he could only hold the land and take the rents and profits, some delay might reasonably be interposed before the exercise of the larger statutory remedy. At all events it is settled, notwithstanding some conflict of opinion, that the proper remedy is by proceeding *in equity for a sale* (*b*). And, notwithstanding the proviso, it has been held that the judgment creditor is entitled to have the interest of his debtor at once *secured* for the creditor's protection (*c*); and as between *two judgment creditors* the one who first obtains the charging order has priority (*d*).

19. **Consideration of the Charging Order provisions.**—The 14th section of the Act, which introduces a species of execution against *stock* and *shares* in *public funds* and *public companies*, which before were not liable, deserves a separate consideration. By that section it is enacted that if any person against whom any judgment (*e*) shall have been entered up

(*g*) *Drummond v. Tracy*, Johns. 608.

(*a*) *Thomas v. Cross*, 2 Dr. & Sm. 423.

(*b*) *Carlton v. Farlar*, 8 Beav. 525; *Footner v. Sturgis*, 5 De G. & Sm. 736; *Smith v. Hurst*, 1 Coll. 705; 10 Hare, 30; *Tuckley v. Thompson*, 1 J. & H. 128, 130; but *Jones v. Bailey*, 17 Beav. 582, is *contra*.

(*c*) *Yescombe v. Landor*, 28 Beav. 80; *Partridge v. Foster*, 34 Beav. 1; *Tillett v. Pearson*, 43 L. J. N. S. Ch. 93. And see *Smith v. Hurst*, 1 Coll. 705, and S. C. 10 Hare, 43; *Mackinnon v. Stewart*, 1 Sim. N. S. 76, 91.  
(*d*) *Thomas v. Cross*, 2 Dr. & Sm. 423.

(*e*) Extended to *Decrees*, &c., by *sect. 18*; and by 3 & 4 Vict. c. 82,



in any of Her Majesty's superior Courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any company in England, standing in his name in his own right (*f*), or in the name of any person in trust for him, it shall be lawful for the Judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, &c., shall stand charged with the payment of the amount for which judgment may [\*807] have been recovered \* and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charges had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of *six calendar months* from the date of such order; and by the next following section of the Act it is provided that the order of the Judge shall be *ex parte* in the first instance, and, on notice to the Bank or Company, shall operate as a *distringas*, and that no disposition of the judgment debtor in the meantime shall be valid as against the judgment creditor, [and that unless the judgment debtor shall within a time to be mentioned in the order show cause, the order shall be made absolute, but the Judge may upon the application of the judgment debtor or any person interested discharge or vary the order.]

20. The leading points decided with reference to this new species of execution are the following:—

*a. By whom charging order should be made.*— [Under the old practice it was held that] in the ordinary case of a *judgment at law*, the application for the charging order must be made to one of the *Common Law Judges*, even though the stock to be charged were standing in the name of the Paymaster-

s. 1, the property intended to be embraced by this section is further defined, so as to include any interest (as a life estate) in stock or shares.

[(*f*) Where shares in a company had been transferred by a father without consideration into the name of his son in order to qualify the son to be a director of the company, to

be re-transferred to the father upon request, it was held that the shares were not standing in the son's name in his own right within the meaning of the Act; *Re Blakely Ordnance Company*, *Frederick Coates's case*, 46 L. J. N. S. Ch. 367; but see *Jeffries v. Reynolds*, 52 L. J. N. S. C. L. 55; 48 L. T. N. S. 358.]

General (a). But where a charging order was to be made in furtherance of a *decree of the Court of Chancery*, it could properly be made by a *Judge of the Court of Chancery* (b). [But now the charging order may be made by any Divisional Court or by any Judge (c).] The charging order is made *ex parte* and *nisi* in the first instance, but when confirmed absolute it operates from the order *nisi* (d).

**β. Charging order will be made at law without deciding the quantum of interest charged.** — Where stocks or funds are *vested in trustees*, and a judgment debtor appears to be interested therein, the charging order will be made at law, so as to affect the *interest of the judgment debtor*, whatever it may be, leaving it to the trustees, if the precise amount of the debtor's interest is not sufficiently defined, to say they will not act except under the direction of the Court (e). [But a charging order cannot be made affecting stocks and shares forming part of a residuary estate in which the debtor is interested but which are meanwhile subject to a direction for conversion (f).]

**\* γ. Bank or public company bound to pay to trustee, [\*808] notwithstanding charging order on interest of cestui que trust.** — Where a charging order is made upon the partial interest of a *cestui que trust in stock or shares* standing in the names of trustees, the Bank or public company whose stock or shares are affected by the charging order, is not concerned with questions arising between the judgment creditor and other persons interested in the trust fund, but is bound, in like manner as before the charging order, to pay the dividends to the trustees (a).

[δ. Judgment payable in futuro. — A charging order may be

(a) *Hulkes v. Day*, 10 Sim. 41.

(b) *Stanley v. Bond*, 7 Beav. 386; *Westby v. Westby*, 5 De G. & Sm. 616; *Wells v. Gibbs*, 22 Beav. 204.

[(c) See Order 46, R. 1, of the Rules of the Supreme Court.]

(d) *Haly v. Barry*, 3 L. R. Ch. App. 452; [*Burns v. Irving*, 3 Ch. D. 291; and see *Widgery v. Tepper*, 6 Ch. D. 364.]

(e) *Fowler v. Churchill*, 11 M. &

W. 57; *Rogers v. Holloway*, 5 M. & Gr. 292; *Cragg v. Taylor*, 12 Jur. N. S. 320; 1 L. R. Ex. 148; 2 L. R. Ex. 131; [*South Western Loan Company v. Robertson*, 8 Q. B. D. 17.]

[(f) *Dixon v. Wrench*, 4 L. R. Ex. 154.]

(a) *Churchill v. Bank of England*, 11 M. & W. 323; [*South Western Loan Company v. Robertson*, 8 Q. B. D. 17.]

made in respect of a judgment made payable on a future day (b).]

c. **Proviso at the end of sect. 14 does not forbid suit for protecting interest of judgment creditor.** — The proviso at the end of the 14th section, forbidding proceedings until *after six calendar months*, applies only to proceedings for enforcing *immediate payment* of the debt by realising the security, and does not prevent the judgment creditor from taking steps to prevent the security given him by the statute from being in the meantime defeated or diminished. Thus, where the funds are standing in the name of the Paymaster-General, the judgment creditor may, *within the six months*, apply for a stop order to restrain the debtor from receiving dividends accruing within the six months (c).

d. **As to effect of charging order in reference of other incumbrances.** — It must be considered as now settled, notwithstanding a decision of the Court of Queen's Bench to the contrary (d), that a judgment creditor who obtains a charging order against stock vested in a trustee is entitled to such interest therein only, as the debtor has, and must take subject to all *specific charges*, whether *notice* thereof may or not have been given to the trustee before he has notice of the charging order (e).

e. And a charging order has no greater effect than an instrument of charge executed by the judgment debtor would have had, so that, if the debts on which the judgment and charging order were founded was void, the charging order is inoperative (f).

[(b) *Youngehusband v. Gisborne*, 1 De G. & Sm. 209; *Bagnall v. Carlton*, 6 Ch. D. 130.]

(c) *Watts v. Jefferyes*, 3 Mac. & G. 372; and see *Bristed v. Wilkins*, 3 Hare, 235. [Under the new practice it is not necessary as a preliminary to obtaining a stop order on a fund in Court to the credit of the Chancery Division by a person who has a judgment in an action in another Division that he should obtain a charging order in that Division; *Hopewell v. Barnes*, 1 Ch. D. 630; *Shaw v. Hudson*, 48 L. J. N. S. Ch. 689.]

(d) *Watts v. Porter*, 3 Ell. & Bl. 743; *Erle, J., diss.*

(e) *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507; *Kinderley v. Jarvis*, 22 Beav. 34; *Scott v. Hastings*, 4 K. & J. 633; [*Punchard v. Tomkins*, 31 W. R. 286, in which case a prior unregistered specific charge of lands in Middlesex, was held to have priority over a subsequent general and roving charge.]

(f) *Re Onslow's Trusts*, 20 L. R. Eq. 677. It has been held under the Irish Act that a conditional charging order made *ex parte* can be served on

\* [(*θ*.) Remedies under charging order. — The judgment creditor is entitled to the same remedies under the charging order, as he would have had if the charge had been created by contract between himself and the debtor; and must therefore, to enforce the charge, institute fresh proceedings for foreclosure or sale, without which the Court has no jurisdiction to order a sale of the shares (*a*).]

(*i*.) Order absolute cannot be discharged. — After the order has been made absolute, it cannot be discharged, even upon the application of a person who shows that the shares were standing in the name of the judgment debtor as a mere trustee for the applicant (*b*).]

21. 2 & 3 Vict. c. 11. — The 1 & 2 Vict. c. 110, was soon followed by another statute (2 & 3 Vict. c. 11), by which it was enacted: — (*i*.) By section 2, that no *judgment* whatsoever should affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless previously registered at the Common Pleas according to the provisions of the Act 1 & 2 Vict. c. 110. (*ii*.) By section 4, that all *judgments, decrees, rules, and orders* registered, or to be registered, at the Common Pleas, according to the provisions of the Act 1 & 2 Vict. c. 110, should, at the expiration of *five years*, be null and void against lands, tenements, and hereditaments, as to *purchasers, mortgagees, or creditors* (*c*), unless they should have again

a person out of the jurisdiction; *Re Gethin*, 9 Ir. Eq. 512. [And see *Re Blakely Ordnance Company*, *Fredrick Coates's case*, 46 L. J. N. S. Ch. 367.]

[(*a*) *Leggott v. Western*, 12 Q. B. D. 287.]

(*b*) *Jeffryes v. Reynolds*, 52 L. J. N. S. C. L. 55; 48 L. T. N. S. 358.

(*c*) These words mean *purchasers, mortgagees, or creditors* becoming such after the omission to re-register, so that, if A. and B. be respectively first and second judgment creditors who both duly register, A. does not, by subsequently omitting to re-register, lose his priority over B.; *Beavan v. Earl of Oxford*, 6 De G. M. & G. 492; *Shaw v. Neale*, 6 H. L. Cas. 581; and

see *Simpson v. Morley*, 2 K. & J. 71; *Benham v. Keane*, 1 J. & H. 697. So where A., B., and C. were successive judgment creditors, and A. registered his judgment on the 12th of March, 1840, but never re-registered; B. registered his judgment in April, 1842, and re-registered in March, 1848; C. registered his judgment on the 18th of March, 1845, and re-registered on the 10th of March, 1850, it was held that C. was first entitled to take the amount due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment. *Re Lord Kensington*, 29 Ch. D. 527.

been registered in the Common Pleas within five years before the right, title, estate, or interest of such purchasers, mortgagees, or creditors accrued (*d*). (III.) By section 5, that as against purchasers and mortgagees *without notice*, no judgment, decree, or order should have a greater effect than a judgment would have had against such purchaser or mortgagee before the passing of 1 & 2 Vict. c. 110. (IV.) By section 8, that judgments, statutes, and recognizances to the Crown should not bind purchasers or mortgagees unless registered as Crown debts at the Common Pleas (*e*).

[\*810] By virtue of the \*above clauses the execution that might under the former statute have been taken out at law against an equitable interest in the hands of a purchaser for value without notice was, in common with every other advantage given by the former statute against such purchaser, recalled, and the purchaser was relieved from the necessity of carrying his search back beyond the period of five years; except as regarded Crown debts, to which the enactment requiring re-registration did not apply.

**Old law still applicable in case of purchase for value without notice.** — A singular result of the 5th section was, that in the occasional, though rarely occurring case of a purchase or mortgage *without notice* of a previously registered judgment, the old law, as it existed before 1 & 2 Vict. c. 110, was resorted to for guidance. Thus, by 1 & 2 Vict. c. 110, judgments were a lien upon leaseholds, but by 2 & 3 Vict. c. 11, s. 5, if a purchaser or mortgagee had no notice of a registered judgment (for registration is not notice *per se*), he was not bound by the judgment unless at the time of the purchase or mortgage an *elegit* had been issued, for by the old law a judgment became a lien only upon chattels upon the writ of execution being lodged in the hands of the sheriff (*a*).

(*d*) And see 18 & 19 Vict. c. 15, s. 6.

(*e*) The Act speaks only of recognizances to the Crown, and not of recognizances in general, as on receiverships, which are also liens on real property. The 27 & 28 Vict. c. 112, s. 1, extends to recognizances generally; but the Act is not retro-

spective, and therefore does not apply to recognizances entered up before the passing of the Act, 29th July, 1864. Recognizances to the Crown are further provided for by 28 & 29 Vict. c. 104, s. 48.

(*a*) *Westbrook v. Blythe*, 3 Ell. & Bl. 737.

22. 3 & 4 Vict. c. 82. — This Act, however, still left open the question whether, by analogy to the cases under the Registry Acts, a purchaser, mortgagee, or creditor, if he had actual notice of an unregistered judgment, was not bound by it; and a subsequent Act, 3 & 4 Vict. c. 82, was passed to obviate this. It was thereby enacted, by the second section, that no *judgment, decree, order, or rule* (not mentioning Crown debts) should, *by virtue of the said Act* (1 & 2 Vict. c. 110), affect any lands at law or in equity as to purchasers, mortgagees, or creditors, until registration (*b*) under the said Act at the Common Pleas, any notice of such judgment, decree, order, or rule to any purchaser, mortgagee, or creditor, in anywise notwithstanding.

23. 18 & 19 Vict. c. 15. — It being, however, doubted whether this Act protected a purchaser, mortgagee, or creditor from the effect of notice as to any remedy against him which the judgment creditor had before, independently of 1 & 2 Vict. c. 110, or whether its effect was not limited to protection against the additional remedy given to the judgment creditor by that Act (*c*), it was, in order to obviate this \*inconvenience, enacted generally, by 18 & 19 [\*811] Vict. c. 15, s. 4, that no *judgment, decree, order, or rule* (*a*), which might be registered under 1 & 2 Vict. c. 110, should affect any lands, &c., at law or in equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum, &c. should have been left with the proper officer, any notice of any such judgment, decree, &c., to any such purchaser, mortgagee, or creditor, in anywise notwithstanding.

24. 22 & 23 Vict. c. 35. — The 22 & 23 Vict. c. 35, s. 22, puts *Crown debts* on the same footing as judgments as regards the necessity of re-registration from time to time, thus reducing the period over which the search for Crown debts should extend to five years, as in the case of judgments, &c.

(*b*) The framer of this Act appears to have overlooked the intermediate Act of 2 & 3 Vict. c. 11, and to have left it doubtful whether re-registration within five years was necessary to exclude the title of a purchaser

with notice. This doubt is now set at rest by sect. 5 of 18 & 19 Vict. c. 15.

(*c*) See *Beere v. Head*, 3 Jon. & Lat. 340.

(*a*) N.B. — Not mentioning Crown debts.

25. **23 & 24 Vict. c. 38.** — By the Law of Property Amendment Act, 23 & 24 Vict. c. 38, s. 1, freehold, copyhold and leasehold estates, were, in respect of *judgments (b)*, *statutes and recognizances*, as against purchasers and mortgagees, placed upon the same footing, and no such judgments, &c., entered up after the date of the Act (*23d July, 1860*), were to affect lands in the hands of purchasers or mortgagees, unless a *writ of execution should have been issued and registered* before the conveyance or mortgage, and unless execution should be put in force within three calendar months from the registration. A purchaser, therefore, was thus precluded from objecting to the title on the ground of his having notice of a judgment entered up after the Act, and registered at the Common Pleas, but upon which no execution had been issued (*c*).

26. **Who are purchasers.** — As to the meaning of the word *purchasers*, it has been held that a wife and children are purchasers under a marriage settlement of the interests limited to them out of the husband's estate, but the husband as to a life-interest limited to himself out of his own estate is not a purchaser, and a judgment therefore would attach upon it just as if it were not the subject of settlement (*d*).

27. **Construction of the Acts.** — And the construction of the Acts extending the remedies of the judgment creditor, is that as to *equitable interests* they are to receive the same construction as the Statute of Frauds, and consequently that simple trusts only can be taken in execution at law (*e*.)

28. **27 & 28 Vict. c. 112.** — We now come to the [\*812] more recent Act, 27 & 28 Vict. c. 112, \* which enacts, by the first section, that no *judgment, statute or recognizance* to be entered up after *29th July, 1864*, shall affect any land until *actual delivery of the land in execution by a writ of elegit or other lawful authority (a)*. And by the

(b) This, by sect. 5, includes decrees, orders in equity and bankruptcy, and other orders having the operation of a judgment.

(c) Wallis v. Morris, 10 Jur. 740; and see Thomas v. Cross, 2 Dr. & Sm. 423.

(d) Re Browne, 13 Ir. Ch. Rep. 283.

(e) Digby v. Irvine, 6 Ir. Eq. Rep. 149.

(a) The provisions of this Act are by 28 & 29 Vict. c. 104, s. 48, extended, as from 1st November, 1865, to Crown debts.

third section, that every writ or other process of execution must be *registered* in the name of the *debtor*. And by the fourth section, that the creditor to whom any land shall have been actually delivered in execution (*b*), is entitled forthwith to obtain from the Court of Chancery, upon petition, an order to be served upon the debtor only for the *sale of the debtor's interest* in the land; and thereupon inquiries are to be directed as to the nature and particulars of such debtor's interest (*c*). And by the fifth section, that if it be found that the land is charged with *any other debt* due on any judgment, statute or recognisance, whether prior or subsequent to the charge of the petitioner, such other creditor is to be served with notice of the order for sale, and is to be at liberty to attend the proceedings; and the proceeds of sale are then to be distributed amongst the parties entitled according to their priorities. It is to be noticed also that judgments are made by the second section to comprise "registered decrees, orders of the Courts of equity and bankruptcy, and other orders having the operation of a judgment."

29. **The Act as affecting equitable interests.** — This Act has a most important bearing upon *equitable* interests. The object of it, as expressed in the preamble, was "to assimilate the law affecting freehold, leasehold, and copyhold estates to that affecting pure personal estates," and it extends to land "or *any interests therein*," and therefore comprises all equitable interests. For the future, therefore, judgments are not to affect any equitable interest "until actual delivery of the land in execution by a writ of *elegit* or *other lawful authority*." But the words "actual delivery" are to be construed in a liberal sense, for incorporeal hereditaments and equities are not capable of manual delivery, and yet are included in the Act. Indeed, as Lord Justice Mellish observed, "The sheriff (as to a *legal elegit*) does not give the creditor *actual*

(b) As to the effect of these words, see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413.

(c) As to the inquiries which the Court directs, see *Re Ventnor Har-*

*bour Company*, W. N. 1866, p. 9; *Re Hull & Hornsea Railway Company*, 2 L. R. Eq. 262; *Gardner v. London Chatham and Dover Railway Company*, 2 L. R. Ch. App. 385.



*possession* of the land itself, but the effect of his return is to vest the legal estate in the creditor, who can then bring an ejectment" (*d*). The Act speaks of delivery of possession, not only by writ of elegit, but "by *other lawful authority*," and this has been held to mean, "any lawful authority which could cause such a delivery in execution as the subject matter is capable of, and where a judgment creditor comes into equity to remove a legal impediment, the relief given is substantially a delivery in possession whether in form it be a writ of assistance or of sequestration, or the appointment of a receiver" (*a*).

**Present state of the law.** — A judgment creditor therefore who comes under the operation of the Act may still institute proceedings for equitable execution against an equitable interest, but the judgment forms no *lien* upon the equitable interest until the creditor has reached some process in equity corresponding to actual execution at law, such as sequestration, or the appointment of a receiver, or an order of sale. Thus a creditor having a judgment against a mortgagor may bring an action against him for equitable execution by the appointment of a receiver, subject to the right of the mortgagee (*b*), or he may take proceedings against the mortgagor and mortgagee for redemption of the mortgage and foreclosure of the mortgagor (*c*). [So a judgment creditor may obtain the appointment of a receiver of a reversionary interest in a trust estate (*d*), or of a life interest in settled funds (*e*), or of a debt or sum of money payable to the judgment debtor to which garnishee proceedings are not applicable (*f*), and the appointment of a receiver may be made *ex parte* upon an interlocutory application immediately after the insti-

(*d*) *Hatton v. Haywood*, 9 L. R. Ch. App. 230.

(*a*) *Hatton v. Haywood*, 9 L. R. Ch. App. 235, *per* Lord Selborne; [*Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252;] and see *Re Bailey's Trust*, 38 L. J. N. S. Ch. 237.

(*b*) *Wells v. Kilpin*, 18 L. R. Eq. 298; [*Kidd v. Tallentire*, W. N. 1877,

p. 21; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

(*c*) *Beckett v. Buckley*, 17 L. R. Eq. 435.

[(*d*) *Fuggle v. Bland*, 11 Q. B. D. 711.]

[(*e*) *Oliver v. Lowther*, 42 L. T. N. S. 47; 28 W. R. 381.]

[(*f*) *Westhead v. Riley*, 25 Ch. D. 413.]

tution of the action (*g*), or without the institution of a fresh action on an interlocutory application in the action in which the judgment was obtained (*h*); and the appointment though made conditional upon the receiver's giving security operates as an *immediate* equitable execution (*i*); and if the property is already in the hands of a receiver, the Court may appoint another receiver but not to act until the earlier receiver has been discharged, which would amount to equitable execution (*j*); and if the appointment of the receiver is merely for the purpose of giving a charge \* and it is [\*814] not intended that the receiver should go into possession, the Court will make the appointment without security, on the judgment creditor and the receiver undertaking that the receiver shall not act without the leave of the Court (*a*).] But should a judgment creditor without taking proceedings for equitable execution present a *petition in a summary way under the Act for sale of the equitable interest*, the petition would be dismissed, as the creditor has no *lien* by virtue of the *judgment itself*, and the Court has not yet awarded any *equitable execution* (*b*); and so, if a creditor having a judgment against a mortgagor bring an action for execution against the equity of redemption, and, *before the Court has made any order amounting to equitable execution*, the mortgagor becomes bankrupt, the action must be dismissed, for no *lien* had attached previously to the bankruptcy which vested the property in the trustees for the benefit of all the creditors equally (*c*).

**Property not capable of actual delivery.**—Where the subject matter is *not in possession*, and therefore is in its nature not capable of *actual delivery* by the sheriff, as in the case of a remainder expectant on a particular estate, there, although

[(*g*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252.]

[(*h*) *Smith v. Cowell*, 6 Q. B. D. 75; *Fuggle v. Bland*, 11 Q. B. D. 711; *Salt v. Cooper*, 16 Ch. D. 544.]

[(*i*) *Ex parte Evans*, *ubi supra*.]

[(*j*) *Per Jessel, M. R.*, *Salt v. Cooper*, 16 Ch. D. 544.]

[(*a*) *Hewett v. Murray*, W. N. 1886, p. 53.]

(*b*) *Re Duke of Newcastle*, 8 L. R. Eq. 700; and see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413; *Re South*, 9 L. R. Ch. App. 369.

(*c*) *Hatton v. Haywood*, 9 L. R. Ch. App. 229.

the sheriff may have made a *return of actual delivery*, yet, as such return is false in law and therefore null, a *petition* for sale under the Act founded upon such return cannot be sustained (*d*).

30. **Whether an *elegit* must be actually sued out.**—The mode of proceeding in equity appears to be this: if the creditor seek to remove some impediment to the *legal* execution of the judgment, he must lay a foundation for the interference of equity [by shewing that the legal remedies have been exhausted. For this purpose it was, prior to the Judicature Act, necessary for the creditor to sue] out an *elegit* at law (*e*); and the same rule prevailed where the judgment was merely an *equitable lien* (*f*); but the *elegit* need not have been returned (*g*); and where the trust estates were in three counties an *elegit* in one was held to be sufficient (*h*). [But since the Judicature Act it is not necessary to sue out an *elegit* if it can be otherwise shown that there is [\*815] no \*property of the debtor against which the *elegit* could be issued for the purpose of satisfying the judgment, and where an affidavit to that effect was made by the creditor, a receiver was appointed although no *elegit* had issued (*a*); and a judgment creditor may in the same action establish a charge and enforce it (*b*).]

**FI. fa. sufficient in case of equitable chattel real.**—When the interest sought to be affected is an *equitable chattel real*, it is sufficient to sue out a writ of *fieri facias* (*c*). And when the assistance of the Court is sought in favour of a County

(*d*) *Re South*, 9 L. R. Ch. App. 369.

(*e*) See *Dillon v. Plasket*, 2 Bligh, N. S. 239; *Neate v. Duke of Marlborough*, 3 M. & Cr. 407; *Mitford on Plead.* 126, 4th edit.

(*f*) *Neate v. Duke of Marlborough*, 9 Sim. 60; 3 M. & Cr. 407; *Godfrey v. Tucker*, 33 Beav. 280; *Imperial Mercantile Credit Association v. Newry and Armagh Railway Company*, 2 Ir. Rep. Eq. 23, *per Cur.*; but see *Tunstall v. Trappes*, 3 Sim. 286; *Rolleston v. Morton*, 1 Conn. & Laws. 257.

(*g*) *Dillon v. Plasket*, 2 Bligh, N. S. 239; and see *Campbell v. Ferrall*, Rep. t. Plunket, 388; [*Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

(*h*) *Dillon v. Plasket*, 2 Bligh, N. S. 239.

[(*a*) *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

[(*b*) *Beckett v. Buckley*, 17 L. R. Eq. 435.]

(*c*) *Gore v. Bowser*, 3 Sm. & G. 1; *Smith v. Hurst*, 10 Hare, 30; *Smith v. Hurst*, 1 Coll. 705; *Partridge v. Foster*, 34 Beav. 1.

Court judgment against an equitable chattel real, it is sufficient to pursue the analogous step of placing a writ of execution in the hands of the high bailiff, pursuant to the County Court Act (*d*).

**Redemption of a mortgage.**—A judgment creditor may *redeem a mortgage* without suing out an *elegit*; for inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it gives to the party the right to come in and redeem other incumbrancers upon the property (*e*).

**Proceedings in equity of judgment creditor after death of conusor.**—Whether the judgment be *legal* or *equitable*, if the creditor take proceedings in equity *after the death of the conusor* for satisfaction of his claim out of the personal assets, and in case of their deficiency, by a sale of the real estate, an actual *elegit* is *not* an essential requisite (*f*).

[31. **Attachment under Order 45.**—In order to found an attachment under Order 45 of the Rules of the Supreme Court, there must be an actual debt at the time, although it need not be then due. Therefore, where a judgment debtor was entitled for life to the income of a trust fund payable half-yearly, and the trustees had duly made the last half-yearly payment and had no money representing income in their hands it was held that there was nothing to attach. The proper course in such a case is to obtain equitable execution by the appointment of a receiver (*g*).]

[32. **Effect of bankruptcy.**—A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution \* or attachment before the date of the [\*816] receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of

(*d*) *Bennett v. Powell*, 3 Drew. 326.

(*e*) *Neate v. Duke of Marlborough*, 3 M. & Cr. 416, *per* Lord Cottonham; and see *Godfrey v. Tucker*, 33 Beav. 284.

(*f*) *Barnewall v. Barnewall*, 3

Ridg. P. C. 24. See the observations of Lord Fitzgibbon, p. 61; *Neate v. Duke of Marlborough*, 3 M. & Cr. 416.

[(*g*) *Webb v. Stenton*, 11 Q. B. D. 518; see *Re Cowan's Estate*, 14 Ch.

D. 638.]

the commission of any available act of bankruptcy by the debtor. And an execution against goods is completed by seizure and sale; an attachment of a debt by receipt of the debt; and an execution against land by seizure, or, in the case of an equitable interest, by the appointment of a receiver (a).]

**33. Case of lands lying in a register county.** — The law as to priority of judgments in the case of lands lying in a *register county* is as to judgments entered up on or before 29th July, 1864 (the date of the last Act), by the combined effect of the County Register Acts and of the Acts of the Queen before referred to, in a singular position.

**Judgment postponed to subsequent purchase or mortgage without notice, unless registered both in County Register and at the Common Pleas.** — It is clearly settled that the County Register Acts are still in force, and consequently that, in order to give a *locus standi* to a judgment creditor over a subsequent purchaser or mortgagee *without notice*, his judgment must be registered both in the County Register and in the Common Pleas, before the completion of the purchase or mortgage (b).

**34. Rights of two judgment creditors inter se.** — But the doctrine of notice does not apply as between *two judgment creditors*; and therefore a judgment creditor, who, by first registering in Middlesex, has gained priority at law over a judgment of previous date duly registered in the Common Pleas, but not in Middlesex, will not be postponed in equity because he had at the time of so registering notice of the prior judgment (c). And, therefore, generally, as between two judgment creditors, the one who first registers in the County Register obtains precedence over one who registers afterwards in the County Register, though he may not have registered first at the Common Pleas (d).

[(a) 46 & 47 Vict. c. 52, s. 45.] 685; and on appeal, 3 De G. F. & J.

(b) *Westbrook v. Blythe*, 3 Ell. & Bl. 737. 318.

(d) *Hughes v. Lumley*, 4 Ell. & Bl.

(c) *Benham v. Keane*, 1 J. & H. 274; *Neve v. Flood*, 33 Beav. 666.

35. **Case where subsequent purchaser or mortgagee has notice.** — Where the subsequent purchaser or mortgagee *has notice* of a prior judgment, the question is, whether the judgment was registered at the Common Pleas before the completion of the purchase or mortgage, since, as we have before seen, unless so registered it cannot bind, *notwithstanding the notice*. But if duly registered in the Common Pleas, then notice to the *purchaser or mortgagee* will, *in equity*, though not in law, supply the want of registration in the county (*e*).

\* 36. 27 & 28 Vict. c. 112. — As to judgments entered since 27 & 28 Vict. c. 112 (29th July, 1864), there must now be not only registration at the Common Pleas, in addition to the County Registry, but also *actual delivery of the land in execution* under the writ (*a*).

## SECTION VIII.

### OF EXTENTS FROM THE CROWN.

1. **Extent binds trust.** — The equitable interest of a term, or of a freehold held in trust, is liable to an extent from the Crown (*b*); and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law (*c*). The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person may be said to *have* lands, when by subpœna in Chancery he may exercise any dominion over them (*d*).

2. **Sale of the lands extended.** — At common law the extent of the Crown did not authorize a *sale* of the lands, but

(*e*) Benham v. Keane, 1 J. & H. 685; Tunstall v. Trappes, 3 Sim. 302; Davis v. Earl of Strathmore, 16 Ves. 427.

(*a*) See *Re Bailey's Trusts*, 38 L. J. N. S. Ch. 237.

(*b*) King v. Lambe, McClel. 422, per Sir W. Alexander; Chirton's case, Dyer, 160, a; S. C. cited Sir E. Coke's

case, Godb. 293; the cases cited Id. 294; Id. 298; Babington's case, cited Id. 299; King v. Smith, Sugd. Vend. & Purch. Append. No. xv. 11th edit. per Ch. Baron Macdonald.

(*c*) Attorney-General v. Sands, Hard. 495, per Lord Hale.

(*d*) See Sir E. Coke's case, Godb. 294.

only the perception of the *rents and profits*, until the amount of the debt was levied (*e*). This defect was supplied partially by a statute of Elizabeth (*f*), and more effectually by 25 G. 3, c. 35. It is by the latter statute enacted, that "it shall be lawful for the Court of Exchequer, and the same Court is thereby authorized, on the application of the *Attorney-General* (*g*) in a summary way by *motion* (*h*) to the same Court, to order that the *right, title, estate, and interest* of *any debtor* to the Crown, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under or by virtue of any extent or *diem clausit extremum*, shall be sold as the Court shall direct, and the conveyance shall be made by the Remembrancer in said Court of Exchequer or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the said Court."

[\*818] \*3. **Equity of redemption.**—By the effect of this enactment, a trust or equity of redemption (*a*) of a Crown debtor may now be sold upon summary application to the Queen's Bench Division by motion.

## SECTION IX.

### OF FORFEITURE.

1. **Trust not forfeitable at common law for attainder.**—A trust of lands was never *forfeitable at common law* for attainder of either treason or felony (*b*); for forfeiture worked only upon *tenure*, and a trust was *holden* of nobody. The ground of the forfeiture at *law* was that all estates were *held* upon condition of duty and fidelity to the lord, and upon breach of allegiance they returned to the Crown, from whom they originally proceeded (*c*).

(*e*) *Rex v. Blunt*, 2 Y. & J. 122,  
per Baron Hullock.

(*f*) 13 Eliz. c. 4.

(*g*) See *Rex v. Bulkeley*, 1 Y. & J.  
256.

(*h*) See *Rex v. Blunt*, 2 Y. & J. 120.

(*a*) *King v. De la Motte*, Forr. 162.

(*b*) *Attorney-General v. Sands*,  
Hard. 495, per Lord Hale; 1 Hale's  
P. C. 247; Jenk. 190.

(*c*) *Gilb. on Uses*, 38.

2. **26 H. 8, c. 13.** — The exemption of the *use* from forfeiture was remedied in the case of *treason*, by 26 H. 8, c. 13, s. 5, whereby it was enacted, that, “every offender convicted of high treason by *presentment*, *confession*, or *process of out-lawry*, should forfeit to the King all such lands, &c., which such offender should have of any estate of inheritance in *use* or *possession*.”

3. **27 H. 8.** — The following year was passed the 27 H. 8, by which *uses* were abolished, and, as the *trust* which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose by special enactment to remedy the defect.

4. **33 H. 8, c. 20.** — The 33 H. 8, c. 20, s. 2, declared, that “if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainder by the *common law* (*d*) should be of as good strength, value, force, and effect, as if it had been done by authority of Parliament; and that the King’s Majesty, his heirs and successors, should have as much benefit and advantage by such attainder, as well of *uses, rights, entries, conditions*, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of Parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which \* his highness ought [\*819] lawfully to have, and which they, being so attainted, ought or might lawfully lose and forfeit, if the attainder had been done by authority of Parliament, *without any office or inquisition to be found of the same*.”

5. **King v. Dacombe.** — Notwithstanding this statute, it was laid down extrajudicially in the reign of James I., and was said to have been so resolved previously (*a*), that the *trust* of a freehold was *not* forfeited upon attainder of treason; and

(*d*) This includes the general statutes of the realm, as opposed to a special Act attainting a particular individual.

(*a*) King v. Dacombe, Cro. Jac. 512.



it has been remarked by the highest legal authority, that this doctrine "may be thought to be founded on reason, because it is not pretended that the statute of 26 H. 8, can embrace trusts which have succeeded to uses, and it does not appear to have been the intention of the 33 H. 8, to create a forfeiture of any equitable estate which has sprung up since the former Act. The statute had other objects" (b).

6. **Construction of 33 H. 8.** — To understand the scope of the enactment it must be observed — 1. That previously to 33 H. 8, it was only in the case of a person attainted by Act of Parliament, and then by a special proviso, that the King was put in *immediate possession* of the offender's lands, for in attainders by ordinary course of law, whether by common law or under a statute, the King was not in possession *until office found*. 2. That 26 H. 8, had extended the forfeiture to lands in *use* or *possession*, but not to *rights, entries, or conditions*; and now that 27 H. 8, had passed, the 26 H. 8, was not even applicable to *uses*, or, as they were henceforth to be called, *trusts*. 3. That 26 H. 8, had embraced attainders by *presentment, confession, verdict, or process of outlawry*, but had omitted other cases, as where the offender stood mute. The intention of the legislature, then, in passing 33 H. 8, was, as resolved in Dowtie's case (c), — 1. To vest the actual possession in the King by the attainder *without office*; 2. To extend the forfeiture to *rights, entries, conditions, &c.*, which had hitherto not been affected by attainder; and, 3. To apply the statutory provisions to all cases of attainder, including those which 26 H. 8, had accidentally omitted.

Assuming the Act to have had a remedial scope, can it be supposed that, when "rights, entries, and conditions" were, for the first time, made forfeitable by virtue of this enactment, the word "*uses*," which occupies the first place in the series, should have been inserted as mere surplusage, remembering that uses, by having been turned into possessions by 27 H. 8, had escaped the \*forfeiture imposed upon them by 26 H. 8? The insertion of the word

(b) Gilb. on Uses, by Lord St. Leonards, 78, note 9; and see Burgess v. Wheate, 1 Eden, 221.

(c) 3 Rep. 9, b.

“uses” can be no argument that “trusts” were not intended, for at that day both words were employed indifferently, as terms perfectly synonymous.

In support of this reasoning may be cited the opinions expressed by Baron Turner and Lord Hale, in the well-considered case of Attorney-General *v. Sands* (a). And Lord Hale afterwards recurs to the subject in his Pleas of the Crown (b), and argues the point there with considerable strength of reasoning:—“By the statute of 27 H. 8,” he says, “all uses were drowned in the land; but there have succeeded certain equitable interests called *trusts*, which differ not in substance from uses; nay, by that very statute they come under the same name—viz. uses or trusts. By the statute 33 H. 8, there is a special clause that the person attainted shall forfeit all ‘uses’; and what other uses there could be at the making of the statute 33 H. 8, but only trusts such as are now in practice and retained in Chancery, I know not. It was agreed in the Earl of Somerset’s case, and so resolved in Abington’s case, that a trust of a freehold was not forfeited by attainder of treason. But how this resolution in Abington’s case can stand with the statute of 33 H. 8, I see not; for certainly the uses there mentioned could be no other than trusts; and therefore the *equity* or *trust itself*, in cases of attainder of treason, seems forfeited by the statute, though possibly the *land itself* be *not* in the King” (c).

7. **Whether equities of redemption subject to forfeiture.**—*Equities of redemption* appear to have been made forfeitable for attainder of treason by 33 H. 8, (d); for the statute enumerates *conditions*, and the interest of the mortgagor is a condition, which, though broken at law, is saved whole to him in a Court of equity.

8. **Trusts of chattels forfeitable upon conviction.**—Trusts of

(a) Hard. 495; S. C. Nels. 131; S. C. Freem. 130.

(b) 1 P. C. 218.

(c) In Attorney-General *v. Sands*, it was laid down, according to Nelson’s report (p. 131), that the estate was executed in the King by force of

the statute; but according to Freeman (p. 130), that the estate was to be executed in the King by a Court of equity, which seems the better opinion.

(d) Anon. case, cited *Reeve v. Attorney-General*, 2 Atk. 223.

*chattels*, whether real or personal, were always forfeitable to the Crown upon conviction (*e*); and if a term was in trust for the *wife* of the felon, but not for her separate use, it seems the trust was affected by the forfeiture of the [\*821] husband (*f*). But \* the wife would still be entitled to a provision under her equity to a settlement (*a*).

9. **Crown entitled to subpœna.** — In these cases the forfeiture did not reach the legal estate vested in the trustee, but entitled the Crown to sue a *subpœna* in equity (*b*).

10. **No forfeiture of property to which a felon is entitled only contingently.** — If a felon at the time of his conviction was only contingently entitled, and before the interest vested he had undergone his punishment, no forfeiture accrued (*c*). But otherwise, if the interest vested before the term of imprisonment expired (*d*). And it was held that where a felon was entitled to a share of proceeds from the sale of real estate, but the sale was not to be made till after the death of A., and the felon had undergone his punishment in the lifetime of A., in this case, as the Crown had no equity during the life of A. to compel a conversion, the Crown was not entitled; otherwise where the time of sale had arrived and the sale had been actually made *before* the felon had suffered his punishment (*e*). *Money* liable to be laid out in the purchase of *land* was regarded as land and so protected from being forfeited as *personal* estate (*f*).

11. **33 & 34 Vict. c. 23.** — Now by 33 & 34 Vict. c. 23, it is enacted that “from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction, or

(*e*) *Wikes's case*, Lane, 54, agreed; *King v. Dacombe*, Cro. Jac. 512; *Jenk. 190*, case 92; *Attorney-General v. Sands*, Hard. 405; *Pawlett v. Attorney-General*, Hard. 467, *per Lord Hale*; *Sir J. Dack's case*, cited *Holland's case*, Aleyn, 16; *Re Thompson's Trusts*, 22 Beav. 506.

(*f*) *Wikes's case*, Lane, 54, *per Barons Snig and Altham*.

(*a*) See *ante*, p. 746.

(*b*) *Holland's case*, Al. 14; *Sir J. Dack's case*, as cited by Rolle, J., Id.

16; *Attorney-General v. Sands*, Hard. 495, *per Lord Hale*; and see *Kildare v. Eustace*, 2 Ch. Ca. 188; S. C. 1 Vern. 405, 419, 423, 428, 437.

(*c*) *Stokes v. Holden*, 1 Keen, 14; and see *Gough v. Davies*, 2 K. & J. 623; *Re Bateman's Trust*, 15 L. R. Eq. 355.

(*d*) *Roberts v. Walker*, 1 R. & M. 752.

(*e*) *Re Thompson's Trusts*, 22 Beav. 506.

(*f*) *Harrop's Estate*, 3 Drew. 726.

judgment of or for any treason, or felony, or *felo de se* shall cause any attainder or corruption of blood, or any *forfeiture* or escheat; provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*" (*g*).

12. **Of forfeiture by equitable tenant for life.** — At law a tenant for life might, until a modern statute (*h*), by certain tortious acts, as by a feoffment of the fee-simple, have forfeited his estate to the remainderman (*i*); but had an *equitable* tenant for life affected to dispose of the *equitable* fee, no forfeiture would have accrued, for nothing passed beyond the grantor's actual interest (*j*). By the Act above referred to all conveyances are now innocent, that is, they pass nothing but what the grantor can lawfully part with.

## \* SECTION X.

[\*822]

OF ESCHEAT.<sup>1</sup>

1. **Trust formerly not subject to escheat.** — [Until the recent Act (*a*)] a trust in fee of lands was not subject to escheat (*b*). This was determined in the great case of *Burgess v. Wheate* (*c*), before Lord Northington, assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges will amply repay a very careful perusal. It may be mentioned generally, that Sir T. Clarke and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by *uses*, and, therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large; for trusts

(*g*) See *supra*, p. 28.[(*a*) 47 & 48 Vict. c. 71.](*h*) 8 & 9 Vict. c. 106, s. 4.(*b*) *Attorney-General v. Sands*,(*i*) See Co. Lit. 251, a.

Hard. 488; and see 1 Harg. Jurid.

(*j*) *Lethieullier v. Tracy*, 3 Atk.

Exerc. 383.

728, 730; *Lady Whetstone v. Bury*,  
2 P. W. 146.(*c*) 1 Eden, 176; S. C. 1 W. Bl.  
123.

<sup>1</sup> Trustees hold either real or personal property subject to the State if the *cestuis que trust* die leaving no heirs or relatives; *Crane v. Reeder*, 21 Mich. 25; *Matthews v. Ward*, 10 G. & J. 443; *McCaw v. Galbraith*, 7 Rich. L. 75; *Re Adams*, 4 Chy. Chamb. 29.

do not follow absolutely the law of uses: for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine that, as lands escheat at law, so trusts must escheat in equity: that trusts, since the statute of H. 8, are not regulated by uses, but the maxim is "Equity follows law,"—"The *trust* is the *estate*." But to this it must be answered that a trust has always been recognized as a thing *sui generis*, and not as identical with the legal fee: it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system: trusts, he thought, were to be administered on the footing of uses; but not, as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8: he agreed with Lord Mansfield, that trusts imitated the legal possession; but he added the qualification, *as between the privies to the trust only*, and not as respected strangers: his objection to the claim of the lord was, that it was for the execution of a trust that did not exist: where there was a trust, it should be considered in that Court as the real estate *between the cestui que trust and the trustee, and all claiming by or under them*; and the trustee should [\*823] take no \*beneficial interest that the *cestui que trust* could enjoy; but he knew no instance where that Court ever permitted the creation of a trust to *affect the right of a third person (a)*.

2. **Trustee retained the estate.**—The result of the determination in *Burgess v. Wheate*, as followed in more recent cases, was, that where the owner of the equitable fee died intestate without heirs the trustee retained the estate (*b*).

(a) 1 Eden, 251.

(b) *Taylor v. Haygarth*, 14 Sim. 16; *Davall v. New River Company*, 3 De G. & Sem. 394; *Cox v. Parker*, 22 Beav. 168; [*Keogh v. M'Grath*, 5 L. R. Ir. 478; *Re Mary Hudson's Trusts*, 52 L. J. N. S. Ch. 789]. As to estates *pur autre vie*, see p. 694,

*supra*. And where a trust of real estate was created in favour of an alien, the Crown was entitled to the benefit of the trust as against both the trustee and the heir at law of the settlor; *Barrow v. Wadkin*, 24 Beav. 1; and see p. 44, *supra*.

3. **Principle applied to equity of redemption.**—The same principle was applied by Sir John Romilly, M. R. to an equity of redemption; and his Honour decided, that, where there was a mortgage in fee and then the mortgagor died intestate without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts (*c*).

[4. **Trust estate now subject to escheat.**—Now by "The Intestates' Estates Act, 1884" (*d*), where a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.]

## SECTION XI.

### THE DESCENT OF THE TRUST.<sup>1</sup>

1. **Trust descends as the legal estate.**—A trust is governed by the same rules of descent as the legal estate is on which the trust is engrafted, and *that* whether the legal estate descends according to the course of common law, or is subject to a *lex loci*.

2. **Seisin ex parte maternā.**—If one seised of land *ex parte maternā* convey to a person in fee upon trust, and no trust is expressed, the resulting interest is part of the original

(*c*) *Beale v. Symonds*, 16 Beav. 406. [(*d*) 47 & 48 Vict. c. 71, s. 4.]

<sup>1</sup> A trust estate may be devised, but an assignment for the benefit of creditors does not convey the trust estate; *Chace v. Chapin*, 130 Mass. 128; *Kelly v. Scott*, 49 N. Y. 595; *Abbott, Petr.* 55 Me. 580. A general devise of real estate will pass property held in trust unless the intention plainly appears to be to the contrary; *Ballard v. Carter*, 5 Pick. 112; *Richardson v. Woodbury*, 43 Me. 206; *Hughes v. Caldwell*, 11 Leigh, 342; as a devise of all my estates; *Bangs v. Smith*, 98 Mass. 273; *Stone v. Hackett*, 12 Gray, 237; *Willard v. Ware*, 10 Allen, 263; mortgage estates will also pass; *Asay v. Hoover*, 5 Barr, 35. In some states, trust property does not descend upon death or removal of trustee, but comes into the control of the courts, and new trustees will be appointed; *McDougald v. Carey*, 38 Ala. 320; *Clark v. Crego*, 47 Barb. 599; *Hook v. Dyer*, 47 Mo. 214.

only the perception of the *rents and profits*, until the amount of the debt was levied (*e*). This defect was supplied partially by a statute of Elizabeth (*f*), and more effectually by 25 G. 3, c. 35. It is by the latter statute enacted, that "it shall be lawful for the Court of Exchequer, and the same Court is thereby authorized, on the application of the *Attorney-General* (*g*) in a summary way by *motion* (*h*) to the same Court, to order that the *right, title, estate, and interest of any debtor* to the Crown, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under or by virtue of any extent or *diem clausit extremum*, shall be sold as the Court shall direct, and the conveyance shall be made by the Remembrancer in said Court of Exchequer or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the said Court."

[\*818] \*3. **Equity of redemption.** — By the effect of this enactment, a trust or equity of redemption (*a*) of a Crown debtor may now be sold upon summary application to the Queen's Bench Division by motion.

## SECTION IX.

### OF FORFEITURE.

1. **Trust not forfeitable at common law for attainder.** — A trust of lands was never *forfeitable at common law* for attainder of either treason or felony (*b*); for forfeiture worked only upon *tenure*, and a trust was *holden* of nobody. The ground of the forfeiture at *law* was that all estates were *held* upon condition of duty and fidelity to the lord, and upon breach of allegiance they returned to the Crown, from whom they originally proceeded (*c*).

(*e*) *Rex v. Blunt*, 2 Y. & J. 122,  
per Baron Hullock.

(*f*) 13 Eliz. c. 4.

(*g*) See *Rex v. Bulkeley*, 1 Y. & J.  
256.

(*h*) See *Rex v. Blunt*, 2 Y. & J. 120.

(*a*) *King v. De la Motte*, Forr. 162.

(*b*) *Attorney-General v. Sands*,  
Hard. 495, per Lord Hale; 1 Hale's  
P. C. 247; Jenk. 190.

(*c*) *Gilb. on Uses*, 38.

2. 26 H. 8, c. 13. — The exemption of the *use* from forfeiture was remedied in the case of *treason*, by 26 H. 8, c. 13, s. 5, whereby it was enacted, that, “every offender convicted of high treason by *presentment*, *confession*, or *process of outlawry*, should forfeit to the King all such lands, &c., which such offender should have of any estate of inheritance in *use* or *possession*.”

3. 27 H. 8. — The following year was passed the 27 H. 8, by which *uses* were abolished, and, as the *trust* which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose by special enactment to remedy the defect.

4. 33 H. 8, c. 20. — The 33 H. 8, c. 20, s. 2, declared, that “if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainder by the *common law* (*d*) should be of as good strength, value, force, and effect, as if it had been done by authority of Parliament; and that the King’s Majesty, his heirs and successors, should have as much benefit and advantage by such attainder, as well of *uses, rights, entries, conditions*, as possessions, reversions, remainders, and all other things, as if it had been done and declared by authority of Parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so attainted, which \* his highness ought [\*819] lawfully to have, and which they, being so attainted, ought or might lawfully lose and forfeit, if the attainder had been done by authority of Parliament, *without any office or inquisition to be found of the same*.”

5. *King v. Dacombe*. — Notwithstanding this statute, it was laid down extrajudicially in the reign of James I., and was said to have been so resolved previously (*a*), that the *trust* of a freehold was *not* forfeited upon attainder of treason; and

(*d*) This includes the general statutes of the realm, as opposed to a special Act attainting a particular individual.

(*a*) *King v. Dacombe*, Cro. Jac. 512.



estate, and will descend in the maternal line, and, failing the heirs on the part of the mother, will rather absolutely determine, than pass into the paternal line (e). But [\*824] if one \*seised *ex parte maternâ* devise to A. and his heirs upon trust for a person for life, and then in trust to convey to the testator's heir at law, this breaks the descent, and the heir *ex parte paternâ* is entitled to the equitable remainder (a).

3. **Gavelkind.** — If the land be subject to *gavelkind*, *borough English*, or other *custom*, the equitable interest will follow the same course of inheritance (b).

4. **Copyholds.** — And a trust of *copyholds* as well as of freeholds is governed by the descent of the legal estate (c).

5. **Possessio fratris.** — The analogy to law is so strictly preserved, that, until a late Act, if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* at law, the trust would have descended to the brother of the half blood, not to the sister of the whole blood (d). By the late Act, the half blood is now in all cases (but subject to the preferable claim of the whole blood) capable of inheriting estates, whether legal or equitable (e).

6. **Proceeds from sale of gavelkind lands.** — If a settlement contain a power of sale with a trust to reinvest the proceeds in a purchase to the same uses, and the lands are sold, but the proceeds are not reinvested, though the bulk of the estate sold was of *gavelkind* tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the heirs of A. at common law, and not to the heirs by the custom of gavelkind (f).

(e) *Burgess v. Wheate*, 1 Eden, 177, see 186, 216, 256; *Langley v. Sneyd*, 1 Sim. & St. 45; *Nanson v. Barnes*, 7 L. R. Eq. 250.

(a) *Davis v. Kirk*, 2 K. & J. 391; [and see *Re Douglas*, 28 Ch. D. 327.]

(b) *Fawcett v. Lowther*, 2 Ves. Sen. 304, per Lord Hardwicke; *Banks v. Sutton*, 2 P. W. 713, per Sir J. Jekyll; *Cowper v. Cowper*, 2 P. W. 720; *Jones v. Reasbie*, 22 Vin. Ab. 186,

pl. 7; *Buchanan v. Harrison*, 1 J. & H. 662.

(c) *Trash v. Wood*, 4 M. & Cr. 324.

(d) *Banks v. Sutton*, 2 P. W. 713, per Sir J. Jekyll; *Cowper v. Earl Cowper*, Ib. 736, per eundem; *Cunningham v. Moody*, 1 Ves. 174; Co. Lit. 14 b; and see the cases cited, *Casborne v. Scarfe*, 1 Atk. 604.

(e) 3 & 4. W. 4, c. 106, s. 9.

(f) *Hougham v. Sandys*, 2 Sim. 95, see 153.

7. **Limitation to heirs as purchasers.** — And if *gavelkind* or *borough English* lands (*g*) be limited to a person's heirs as *purchasers* the *common law heirs* and not the customary heirs are entitled; as, where a testator directed trustees to stand seised of *gavelkind* lands for the separate use of A. for life, and so as her husband should not intermeddle therewith, and after her death upon trust to convey to the heirs of her body forever, Lord Hardwicke held that the trust was executory, and that the Court must therefore look to the intention, which was to give a life-estate to A., and the remainder to the heirs as *purchasers* (*h*); \*for, as the [\*825] husband was not to intermeddle therewith, his curtesy was to be excluded, which would not be the case if A. were tenant in tail. A conveyance of the legal estate was therefore directed to the *eldest* son and the heirs of his body, with remainder to the second son, and the heirs of his body, &c. "Not," added Lord Hardwicke, "according to the custom of *gavelkind*, because it must go according to the rule of common law, being not a trust executed, but executory" (*a*).

## SECTION XII.

### OF ASSETS.<sup>1</sup>

The general law relating to *assets*, as it stood previously to the Statute of Frauds may be thus stated.

1. **Legal assets.** — The executor or administrator of the deceased was bound to apply his *personal estate* in payment

(*g*) Polley v. Polley (No. 2), 31 Beav. 363; [Garland v. Beverley, 9 Ch. D. 213.]

*tor's heirs*, confers an estate by purchase.

(*h*) Now by 3 & 4 W. 4, c. 106, s. 3, a limitation in a deed to the settlor or his heirs, or in a will to the testa-

(*a*) Roberts v. Dixwell, 1 Atk. 607; and see Thorp v. Owen, 2 Sm. & G. 90; Sladen v. Sladen, 2 J. & H. 369.

<sup>1</sup> If creditors assent to a trust set forth in a will, they cannot afterwards resort to legal remedies; Bank of United States v. Beverly, 1 How. 134; and claims are barred by statute of limitations, just as they would be if no trust existed; Hall v. Bumstead, 20 Pick. 2; Steele v. Steele's Adm'r, 64 Ala. 460; Bull v. Bull, 8 B. Mon. 332; Man v. Warner, 4 Whart. 455; Cornish v. Willson, 6 Gill. 318; if a trust to pay debts is created, it will keep alive a judgment

of his debts; and this in the order of their legal priorities, as first of judgments, then of specialties, then of simple contract debts; or, as it was expressed, the personal estate was *legal assets*.

2. *Assets by descent*. — Again, where the deceased had executed an instrument binding himself and his *heirs*, the heir to the extent of the real estate (except copyholds) which came to him, was bound to satisfy this obligation of his ancestor, or, in other words, the lands so inherited were *assets by descent*.

lien; *Pettingill v. Pettingill*, 60 Me. 412; *Trinity Church v. Watson*, 50 Pa. St. 518; there is danger, that in providing for some debts, the liens of other creditors may be terminated; *Cadbury v. Duval*, 10 Barr. 267; *Gardner v. Gardner*, 3 Mason, 178. Debts of an estate must be paid out of the personal property, if it is sufficient for the purpose, and this applies to debts which are secured by collateral; *Hewes v. Dehon*, 3 Gray, 206; *Hancock v. Minot*, 8 Pick. 29; *Marsh v. Marsh*, 10 B. Mon. 360; *Lewis v. Thornton*, 6 Munf. 87; *Leavitt v. Wooster*, 14 N. H. 551; *Schermerhorn v. Barhydt*, 9 Paige, 29; *Martin v. Fry*, 17 Serg. & R. 426; but this does not apply to an incumbrance on land at the time of its purchase by the deceased; *Andrews v. Bishop*, 5 Allen, 490; *Cumberland v. Codrington*, 3 Johns. Ch. 229. As to priority of liability of various parcels of real estate for debts, see *Livingston v. Livingston*, 3 Johns. Ch. 148; *Commonwealth v. Shelby*, 13 Serg. & R. 348; *Ruston v. Ruston*, 2 Yeates, 54; *Warley v. Warley*, 1 Bail. Eq. 398; *Plimpton v. Fuller*, 11 Allen, 140; *Stroud v. Barnett*, 3 Dana, 394. The testator may provide for the payment of all debts out of his realty; see notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 56, and *Ancaster v. Mayer*, 1 Lead. Cas. Eq. 505; in which case the heir or devisee becomes a trustee for the payment of the debts; *Stevens v. Gregg*, 10 G. & J. 143. The payment of legacies from the real or personal estate will be controlled by language similar to that used in reference to the payment of debts; *Sherman v. Sherman*, 4 Allen, 392; it depending on the testator's intention, as shown by his language; *Gridley v. Andrews*, 8 Conn. 1; *Paxson v. Potts*, 2 Green, Ch. 322; *Montgomery v. M'Elroy*, 3 Watts & S. 370; *Lupton v. Lupton*, 2 Johns. Ch. 618. Legacies to be payable from the real estate, must have clear provision made to that effect; *Owings' Case*, 1 Bland. 290; *Adams v. Brackett*, 5 Met. 282; and the residuary clause usually includes both real and personal; *Canfield v. Bostwick*, 21 Conn. 550; *Tracy v. Tracy*, 15 Barb. 503. Ordinarily the real estate is to be used in payment of legacies only after the personalty has been exhausted; *Lewis v. Darling*, 16 How. 10; *Fenwick v. Chapman*, 9 Pet. 466. If the debts are to be paid out of realty, legatees will be paid out of personalty; *Bardwell v. Bardwell*, 10 Pick. 19; *Smith v. Wyckoff*, 11 Paige, 49; *Miller v. Harwell*, 3 Murph. 194. Where realty is devised to executor or trustee to pay legacies, he becomes personally liable for the payment; *Bugbee v. Sargent*, 23 Me. 269; *Dodge v. Manning*, 11 Paige, 334; *Larkin v. Mann*, 53 Barb. 267; and the realty charged can be followed by the devisees or legatees in case of non-payment to them; *Solliday v. Gruver*, 7 Pa. St. 452; *Aston v. Galloway*, 3 Ired. Eq. 126; *Hallett v. Hallett*, 2 Paige, 15.

3. **Equitable assets.** — The 32 Henry 8, c. 15, which first gave the power of *devising* lands, inadvertently opened a door to fraud, since it was held that if the owner of land devised it away, a creditor claiming by bond or other instrument binding the heir could not sue the *devisee*, and if he sued the *heir*, the latter might plead he had no land by descent. Where, however, the owner had by his will *charged* his lands with or devised them subject to the payment of debts, a Court of equity viewed the creditors as *cestuis que trust*, and made the land available in satisfaction of the debts; and in doing this it paid all the creditors *pari passu* without reference to their legal priorities, that is, the lands so charged or devised were *equitable assets*.

4. **Equitable interests.** — With these prefatory remarks we proceed to the consideration of *equitable interests* as assets *before the Statute of Frauds*.

\* 5. **Trusts of chattels are assets.** — The trust of a [\*826] *chattel* was always accounted assets in equity (*a*); by which is meant, not *equitable assets*, but assets for the due application of which in payment of debts the personal representative was responsible in *equity*, if not at law.

6. **Trusts of a freehold.** — But whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty was for a long time *voxata questio*. On the one hand it was argued, that the trust ought to follow the use, and that the use was *not* liable to a bond creditor; on the other hand it was said, that trusts since the Statute of Uses had been conducted by the Courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, so a Court of equity ought to adopt the same rule in the administration of trusts.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet v. Box*, that a trust in fee should not be assets (*b*); and Lord Keeper Bridgman afterwards felt himself bound by the authority of this decis-

(*a*) *Attorney-General v. Sands*, Rep. 33; *Duke of Norfolk's case*, 3 Freem. 131; *Barthrop v. West*, 2 Ch. Ch. Ca. 10. See *post*, 827.

(*b*) 1 Ch. Ca. 13.

ion in respect of a *trust* (c), though he doubted somewhat as to an *equity of redemption* (d); and so the law as to a trust was laid down by Lord Hale in *Attorney-General v. Sands* (e).

The question was renewed before Lord Nottingham in *Grey v. Colville* (f), when trust estates were declared to be *assets in equity*. The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed v. Colville* (g), and his Lordship said, he "should be much governed by the case of *Bennet v. Box*, unless they could show that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the Court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the question (h). In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lords Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, *the bill should be dismissed without further motion* (i).

[\*827] No further proceedings \* appear in the case; and, therefore, it must be concluded that the bill was dismissed. There can be no doubt, however, that Lord Nottingham's decision was correct, and in *Goffe v. Whalley* (a) the question was renewed, but the result does not appear, unless the overruling of the heir at law's demurrer to the creditor's bill was on the ground that the Court held the trust to be assets.

7. **Statute of Frauds.**—Thus stood the law before the Statute of Frauds (b). By the 10th section of that Act a trust in fee-simple was declared to be assets by descent. But the enactment was taken to embrace *simple* trusts only, and

(c) *Pratt v. Colt*, 1 Ch. Ca. 128;  
S. C. Freem. 139

(d) *Trevor v. Peryor*, 1 Ch. Ca.  
148.

(e) *Hard.* 490; S. C. Freem. 131;  
S. C. Nels. 134.

(f) 2 Ch. Rep. 143.

(g) 1 Vern. 172.

(h) R. L. 1683, A. fol. 166.

(i) R. L. 1684, A. fol. 210.

(a) 1 Vern. 282, Raithby's edit.

(b) 29 Car. 2, c. 3.

not *complicated* trusts (*c*), or equities of redemption (*d*), so that the question still remained whether such interests as were not within the statute might not still, upon the *general principles* of equity, be treated as assets by analogy to law. This was expressly so decided as to equities of redemption in *Plucknet v. Kirk* (*e*) and other cases (*f*); and upon principle, the rule governing equities of redemption ought equally to be applied to every other equitable interest.

8. 3 & 4 W. 4, c. 104. — The question is now of little importance, as it was enacted by 3 & 4 W. 4, c. 104, that all a person's "*estate or interest*" (which must include any trust) in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, should be assets for the payment of debts as well on simple contract as on specialty.

9. **Whether a trust is legal or equitable assets.** — There remains to be considered the question, whether a trust shall, as to persons who died *before 1st January, 1870* (*g*), be administered as *legal* or *equitable* assets.

10. **Trust of a chattel.** — It has in some cases been considered that the mere circumstance that property was *equitable* at the testator's death, was sufficient to make it *equitable assets* (*h*), but this is clearly erroneous, the question being, not whether the assets can be recovered at law or in equity, but whether the *creditor* can obtain payment thereout only from a Court of equity (*i*). Now if an executor recover money in that character under a trust or other equitable right, the \*proceeds *when actually come to his* [\*828] *hands*, will be legal assets, even in a Court of law (*a*);

(*c*) The former part of the clause, which enables the sheriff to take a trust in execution, was construed not to include a *complicated* trust, and therefore it is presumed the latter part of the clause could not be differently interpreted.

(*d*) *Plunket v. Penson*, 2 Atk. 293, *per* Lord Hardwicke; *Solley v. Gower*, 2 Vern. 61, *per* Lord Jeffries.

(*e*) 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 844; and see Lord Jeff-

ries' opinion in *Solley v. Gower*, 2 Vern. 61.

(*f*) Anon. Freem. 115; *Acton v. Peirce*, 2 Vern. 480; *Plunket v. Penson*, 2 Atk. 290.

(*g*) See *post*, 831.

(*h*) *Cox's case*, 3 P. W. 341, and note *Ib.*; *Hartwell v. Chitters*, Amb. 308; *Clay v. Willis*, 1 B. & C. 372.

(*i*) *Cook v. Gregson*, 3 Drew. 549.

(*a*) *Hawkins v. Lawse*, 1 Leon. 155, *per* Periam, J.; Anon. case, 1

and it would be an inconsistency to say, that if the property has been reduced into possession, a Court of equity shall administer it as legal assets, but if it be outstanding at the time when the creditor institutes proceedings in equity, it shall be administered as equitable assets. Upon this principle it has at length been established, after much fluctuation (*b*), that equitable interests in personal estate are to be distributed as legal assets (*c*). "Whether," observed Sir R. Kindersley, "the assets are such that the executor can recover them in a Court of law or in a Court of equity only is immaterial. The true test is, whether he recovers them *"virtute officii."* If the assets come to his hands *as executor*, a Court of law would treat them as assets and they are to be administered (in equity) as legal assets" (*d*).

11. **Trust in fee in the hands of the heir.** — A trust in *fee* stands in a very different light from the trust of a *chattel* in the hands of the executor. As regards the inheritance, until modern Acts (*e*), it was only in respect of creditors by specialty in which the heirs were bound, that the question of legal or equitable assets could in fact have arisen, for specialties in which the heirs were not bound, and simple-contract debts, were not payable out of real estate, and statutes and judgments though *liens*, to a partial extent, upon the equitable fee, were not payable as debts, but as incumbrances. In respect then of specialties in which the heirs were bound, a plain and simple trust was made assets in a Court of law in the hands of the *heir* by the Statute of Frauds, and therefore was *legal assets* in equity (*f*); but complicated trusts, and equities of redemption, were not touched by the statute; and it would seem, upon principle, that as equity subjected the trust to specialty creditors by analogy only to law, the Court

Roll. Rep. 56; *Harwood v. Wrayman*, cited *Ib.*; S. C. reported Mo. 858.

(*b*) See cases cited in note (*h*) p. 827; and *Morgan v. Sherrard*, 1 Vern. 293; *Wilson v. Fielding*, 10 Mod. 426; S. C. 2 Vern. 763; *Sharpe v. Earl of Scarborough*, 4 Ves. 541.

(*c*) *Cook v. Gregson*, 3 Drew. 547; *Shee v. French*, *Ib.* 716; *Christy v.*

*Courtenay*, 26 Beav. 140; and see *Lovegrove v. Cooper*, 2 Sm. & G. 271; *Mutlow v. Mutlow*, 4 De G. & J. 539.

(*d*) *Cook v. Gregson*, 3 Drew. 547.

(*e*) 47 G. 3, c. 74, Sess. 2, as to traders only; and 3 & 4 Will. 4, c. 104, which will be noticed presently.

(*f*) *Plunket v. Penson*, 2 Atk. 293, per Lord Hardwicke; *King v. Ballett*, 2 Vern. 248.

ought, by observing the analogy throughout, to adopt the *legal course of administration*.

In the case of *Grey v. Colville*, before referred to, in which bond-creditors, had, *after* the debtor's decease, entered up judgments against the *heir* who took by descent; it appears to have been \*assumed by the litigants, and [\*829] was decreed by Lord Nottingham, than whom no Chancellor had a more just conception of the true nature of trusts, that the creditors should be paid *according to the priority of their judgments* out of a trust in fee (*a*).

12. **Whether trust in fee devised is legal or equitable assets.** — In the case of the *devise* of a *trust* in fee, the analogy presented by the case of the devise of a *legal fee* ought, it is conceived, to be pursued. By 3 & 4 W. & M. c. 14, the power of the owner of the land to devise it away in fraud of his creditors (*b*) was first restrained, and a remedy was given against the heir and devisee jointly, in respect of the property so devised. The statute, however, expressly excepted from its operation, as do also the subsequent Acts enlarging the creditors' remedies (*c*), devises clothed with a trust or charge for payment of debts. It is conceived, that the true test whether an equitable estate in fee devised shall be legal or equitable assets, is, whether the estate *if legal and devised in similar terms* would have constituted legal or equitable assets (*d*).

13. **3 & 4 W. 4, c. 104.** — By 3 & 4 W. 4, c. 104, it was enacted that when any person should die seised of or entitled to any *estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, *which he should not by his last will have charged with, or devised subject to the payment of his debts*, the same should be assets, *to be administered in Courts of equity* for the payment of the just debts of such person, as well debts due on simple contract as on

(a) *Grey v. Colville*, 2 Ch. Rep. 143; and see *Morrice v. Bank of England*, 2 Sw. 586; *Dollond v. Johnson*, 2 Sm. & G. 301.

(b) See p. 206, *supra*.

(c) 47 G. 3, c. 74, Sess. 3; 11 G. 4, & 1 W. 4, c. 47; 3 & 4 W. 4, c. 104.

(d) See *Plunket v. Penson*, 2 Atk. 51, 290; *Sharpe v. Earl of Scarborough*, 4 Ves. 538; and the observations on those cases in 3d edit. p. 690.



specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, should be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seised of freehold estates, was or were before the passing of that Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: provided always that in the administration of assets *under and by virtue of that Act* all creditors by specialty in which the heirs were bound should be paid the full amount of the debts due to them before any of the creditors, by simple contract, or by specialty in which the heirs were not bound, should be paid any of their demands.

[\*830] \* **Construction of the Act.** — Upon the construction of this statute the following observations occur:—

a. The Act creates a *general* charge on the estate for the benefit of creditors (a), subject only to the right of alienation in the heir or devisee (b).

β. The words “assets to be administered in equity” mean only that the creditor’s *remedy* shall be in equity, and not that the estate shall be administered as *equitable assets*, and therefore the estate is to be distributed as legal assets (c).

[γ. But no right of retainer is given to the heir or devisee for a debt due to him on simple contract. But it would seem that there is such a right of retainer in respect of a specialty debt (d).]

(a) *Kinderley v. Jervis*, 22 Beav. 1.

(b) See cases, p. 249, note (g).

(c) *Foster v. Handley*, 1 Sim. N. S. 200; more fully reported, 15 Jur. 73; *Re Burrell*, 9 L. R. Eq. 443; [but see *Re Illidge*, 24 Ch. D. 654, in which the earlier cases were not cited, where it seems to have been assumed by Chitty, J., that the assets were to be administered as equitable assets; and see S. C. on appeal, 27 Ch. D. 478.]

[(d) *Re Illidge*, 24 Ch. D. 654; 27 Ch. D. 478; explaining *Ferguson v. Gibson*, 14 L. R. Eq. 379. The founda-

tion of the rule, allowing the right of retainer out of the real estate to an heir at law or devisee being a specialty creditor, was, that he might not be under a disadvantage by not being able to sue himself; since, if he could not retain, other creditors might have obtained priority over him by suing him. But a simple contract creditor could not get a judgment giving him priority, and so the rule had no application in his case. There appears to be nothing in 32 & 33 Vict. c. 46 to take away from a creditor by

δ. The express terms of the Act giving priority to creditors by specialty in which the heirs are bound over creditors by specialty in which the heirs are not bound, have, as a matter of course had full effect given to them (e).

ε. The Act makes no mention of debts by *judgment* or by *decree of a Court of equity*, so that the remedies for the recovery of these out of the real estate may perhaps be viewed as still depending upon the general law (f).

\* 14. 32 & 33 Vict. c. 46. — As regards the admin- [\*831]  
istration of estates of persons who may have died *on*  
*or after 1st January, 1870*, the legislature has now abolished

specialty in which the heir is bound, the old right of action against the heir or devisee, and it seems to follow that the statute, by making real estate liable to be administered by Courts of equity, no more takes away the right of the heir or devisee to retain, than the power of Courts of equity to administer personal estate takes away an executor's right of retainer; *Re Illidge, ubi supra.*]

(e) *Richardson v. Jenkins*, 1 Drew. 477.

(f) *Judgments* against the *testator* or *intestate* and decrees in equity against the *testator* or *intestate* are paid out of the personal estate *pari passu*. Decrees (if for payment of money or costs) were by 1 & 2 Vict. c. 110, s. 18 (though they were not formerly, *Bligh v. Darnley*, 2 P. W. 619, *Mildred v. Robinson*, 19 Ves. 585,) *liens* upon the real estate; and they always ranked as of equal degree with judgments in the administration of *personal* estate, and therefore above specialty or simple contract debts; *Searle v. Lane*, 2 Vern. 37; *Foly's case*, 2 Eq. Ca. Ab. 459; *Stasby v. Powell*, 1 Freem. 333; *Peploe v. Swinburn*, Bumb. 48. Judgments and decrees against the *personal representative* are paid out of legal assets in the order of their dates; *Dollond v. Johnson*, 2 Sm. & G. 301, and cases cited, *ib.* When dockets were in use, a judgment against a person had no

priority in the administration of his assets over other debts unless it was docketed; *Hickey v. Hayter*, 6 T. R. 384; *Landon v. Ferguson*, 3 Russ. 349. But when the docket was closed the judgment had priority *per se*, and the executor or administrator was bound by that priority though he had no notice, and no means of obtaining notice of the judgments; *Fuller v. Redman*, 26 Beav. 600. To remedy this inconvenience it was enacted by Lord St. Leonards' Law of Property Amendment Act, 23 & 24 Vict. c. 38, ss. 3, 4, that judgments should have no priority in the administration of assets unless they were registered. But the Act does not apply where the judgment is recovered against the executor or administrator, as in that case the personal representative has full notice necessarily, and no remedy is required; *Jennings v. Rigby*, 33 Beav. 198; *Gaunt v. Taylor*, 3 Man. & G. 886, and 3 Scott (N. S.) 700; *Re Williams' Estate*, 15 L. R. Eq. 270. And the Act is retrospective, so that an unregistered judgment, though entered up against a debtor living at the date of the Act has no preference; *Kemp v. Waddingham*, 1 L. R. Q. B. 355. But otherwise, where the debtor was dead at the date of the Act, so that the creditor had acquired a vested right; *Evans v. Williams*, 2 Dr. & Sm. 324.

the distinction between *specialty* and *simple contract* debts, and has directed all specialty and simple contract debts to be paid *pari passu* (a). [But this does not interfere with or enlarge the right of the retainer of the executor (b).]

15. **Retainer by executor.** — Where there are specialty debts and simple contract debts, and the right of retainer of the executor is in respect of a simple contract debt, the assets should be apportioned on the footing of giving all the creditors an equal dividend. The dividend in respect of the specialty debts is payable to them in full, and out of the residue of the assets the executor will retain his debt, and the surplus, if any, is divisible ratably among the other simple contract creditors (c).

16. **Administration in bankruptcy of estate of deceased debtor.** — By the Bankruptcy Act, 1883 (d), sect. 125, an order may be made in bankruptcy for the administration according to the law of bankruptcy of the estate of a deceased debtor; but the order is not to be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative, or unless an act of bankruptcy is proved to have been committed by the debtor within three months prior to his decease. And even where proceedings for administration of the debtor's estate have been instituted in another Court, such Court may, on the application of any creditor having a qualifying debt, and on proof that [\*832] the estate is \*insufficient to pay its debts, transfer the proceedings to the bankruptcy Court, and thereupon the bankruptcy Court can make an order for the administration of the estate according to the law of bankruptcy. It is, however, in the discretion of the Court in which the estate is being administered to retain the administration, and where the estate was small, the number of creditors small, and considerable expense had been incurred in the adminis-

(a) 32 & 33 Vict. c. 46.

[(c) *Wilson v. Coxwell*, 23 Ch. D.

[(b) *Re Williams' Estate*, 15 L. R. 764.]

Eq. 270; *Crowder v. Stewart*, 16 Ch.

[(d) 46 & 47 Vict. c. 52.]

D. 368; *Wilson v. Coxwell*, 23 Ch. D.

764.]

tration before the application for transfer was made, the Court refused to order the transfer; and expressed a doubt whether a creditor who had not proved his debt had any *locus standi* to apply for the transfer (a). By sub-sect. (5), upon an order being made for administration, the property of the debtor vests in the official receiver as trustee, and he is to realize and distribute it in accordance with the provisions of the Act. But by sub-sect. (7) he is to have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him, and such claims are to be deemed a preferential debt, and paid in full out of the debtor's estate, in priority to all other debts. By sub-sect. (8) any surplus assets, after payment in full of all debts, costs of administration, and interest, are to be paid over to the legal personal representative of the debtor, or dealt with in such other manner as may be prescribed. By sub-sect. (9) notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under the section, if an order for administration is made thereon, is to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative is to operate as a discharge as between himself and the official receiver, but save as aforesaid nothing in the section is to invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

If an order for administration be made under this section, the executor's right of retainer will, as from the time of his receiving notice of the petition, cease so far as regards any assets not actually retained at the date of the notice.]

[(a) *Re Weaver*, 20 Ch. D. 236.]

RELIEF OF THE CESTUI QUE TRUST AGAINST THE FAILURE  
OF THE TRUSTEE.<sup>1</sup>

WE have now pointed out in what the estate of the *cestui que trust* primarily consists. We have also examined what are the incidents and properties of it by analogy to estates at law or by statute. It follows next that we speak of certain *collateral or subsidiary rights*, by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

<sup>1</sup> A trust will not be allowed to fail for want of a trustee, as if the trustee dies, is disabled, or otherwise becomes unable to perform the duties of his office; *Bundy v. Bundy*, 38 N. Y. 410; *Crocheron v. Jaques*, 3 Edw. Ch. 207; *Vidal v. Girard*, 2 How. 128; *McCartney v. Bostwick*, 32 N. Y. 53; the same is true if there has never been a trustee, as the courts will appoint one; *Treat's App.* 30 Conn. 113; *Gibbs v. Marsh*, 2 Met. 243; *Malin v. Malin*, 1 Wend. 625; *King v. Donnelly*, 5 Paige, 46. The person who chances to hold the legal title may become a trustee; *Adams v. Adams*, 21 Wall. 186. If a trustee is illegally appointed, the courts will appoint another; *Levy v. Levy*, 40 Barb. 585; *Vidal v. Girard*, 2 How. 188; *Winslow v. Cummings*, 3 Cush. 358; or if he refuses to act; *De Peyster v. Clendining*, 8 Paige, 295; *Field v. Arrowsmith*, 3 Humph. 442; *Hawley v. James*, 5 Paige, 318; likewise if the office in any way becomes vacant; *Wilson v. Towle*, 36 N. H. 129; *White v. Hampton*, 13 Ia. 259; *Pool v. Cummings*, 20 Ala. 563; *Gibson's Case*, 1 Bland. 138. One sometimes becomes a trustee without an appointment, as if a husband conveys, or attempts to convey, property directly to his wife, he becomes a trustee for her; *Garner v. Garner*, Busbee, Eq. 1; *Huntly v. Huntly*, 8 Ired. Eq. 250. Courts will also aid in the execution of trusts; *Eldredge v. Heard*, 106 Mass. 582; *Greenough v. Welles*, 10 Cush. 576; and in some cases where powers partake strongly of the nature of trusts, they will also assist in their execution; *Babbitt v. Babbitt*, 26 N. J. Eq. 44; *Erickson v. Willard*, 1 N. H. 217; *Miller v. Meetch*, 8 Barr, 417; *Wilkinson v. Getty*, 13 Ia. 157. If courts have to restrain or remove trustees, they will provide for the vacancies; *Sloo v. Law*, 3 Blatchf. C. C. 459.

1. **Trust follows the estate.**—It is a general rule that, whenever the intention of the settlor can be clearly collected, and there is no want of consideration, the court will follow the estate into the hands of the *legal* owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance.

**Trustee dying in testator's lifetime, or otherwise failing.**—Thus, if a deviser or settlor appoints a trustee, who either dies in the testator's lifetime (*a*), or disclaims (*b*), or is incapable of taking the estate (*c*), or if the trustee otherwise fail (*d*), the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved. "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that *the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice*. A court of equity considers devises of trusts as \* distinct substantive devises, standing on their [\*834] own basis, independent of the legal estate: and the *legal estate* is nothing but the *shadow which always follows the trust estate* in the eye of a court of equity" (*a*).

2. **Direction to sell, and no person to sell named.**—If a testator direct a sale of his lands for certain purposes, but *omits to name a person* to sell, the trust attaches upon the conscience of the heir, and he is strictly bound in equity to give effect to the intention (*b*).

3. **Direction for separate use and no trustee appointed.**—So, if [before the Married Women's Property Act, 1882,] the lands were devised (*c*), or a sum of money was bequeathed (*d*) to a *feme covert* for her sole and separate use,

(*a*) *Moggridge v. Thackwell*, 3 B. C. C. 528; S. C. 1 Ves. jun. 475, *per* Lord Thurlow; *Attorney-General v. Downing*, Amb. 552, admitted; *Tempest v. Lord Camoys*, 35 Beav. 201.

(*b*) *Backhouse v. Backhouse*, V. C. of Eng. 20 Dec. 1844.

(*c*) *Sonley v. Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349; *White v. Baylor*, 10 Ir. Eq. Rep. 53, 54.

(*d*) *Attorney-General v. Stephens*, 3 M. & K. 347.

(*a*) *Attorney-General v. Lady Downing*, Wilm. 21, 22.

(*b*) First clearly settled in *Pitt v. Pelham*, Freem. 134.

(*c*) *Bennet v. Davis*, 2 P. W. 316; *Major v. Lansley*, 2 R. & M. 355.

(*d*) *Rollfe v. Budder*, Bumb. 187; *Tappenden v. Walsh*, 1 Phillim. 352; *Prichard v. Ames*, T. & R. 222; *Par-*

but without the interposition of a trustee, the property vested at *law* in the husband, in her right, but in *equity* he held upon trust for the separate use of the wife.

4. *Failure of trustee of a power imperative.*—We have seen, in a former chapter, that powers are distributable into powers *arbitrary* and powers *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. “If,” said Lord Eldon, “the power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a *trustee for the exercise of the power*, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it”(e). “As to the objection,” said Lord Chief Justice Wilmut, “that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers*, but *trusts*, and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This court supplies the *defective execution* of powers, but never [\*835] the \**non-execution* of them, for the powers are meant to be *optional*. But the person who creates a trust means it should *at all events* be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are ap-

ker v. Brooke, 9 Ves. 583; and see Roberts v. Spicer, 5 Mad. 491; Wills v. Sayers, 4 Mad. 409; Rich v. Cockell, 9 Ves. 375. At first there

was some doubt: Harvey v. Harvey, 1 P. W. 125; Burton v. Pierpoint, 2 P. W. 78. (e) Brown v. Higgs, 8 Ves. 574.

pointed at all, this court assumes the office. There is some personality in every choice of trustees; but this personality is *res unius ætatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?' No: I trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all "(a).

5. **Trustee of a discretion dying in testator's lifetime, declining office, &c.** — If trustees, then, have an *imperative power* committed to them, and they either die in the testator's lifetime (b), or decline the office (c), or disagree among themselves as to the mode of execution (d), or do not declare themselves before their death (e), or if from any other circumstance (f), the exercise of the power by the party intrusted with it becomes impossible, the Court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the Court assumes the jurisdiction of exercising the power *retrospectively* (g), and will take up the trust, whatever difficulties or impractic-

(a) *Attorney-General v. Lady Downing*, Wilm. 23.

(b) *Attorney-General v. Lady Downing*, Wilm. 7; S. C. Amb. 550; *Attorney-General v. Hickman*, 2 Eq. Ca. Ab. 193; *Maberly v. Turton*, 14 Ves. 499.

(c) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 184; *Gude v. Worthington*, 3 De G. & Sm. 389; *Izod v. Izod*, 32 Beav. 242.

(d) *Moseley v. Moseley*, Rep. t. Finch, 53; and see *Wainwright v. Waterman*, 1 Ves. jun. 311.

(e) *Hewett v. Hewett*, 2 Eden, 332; *Flanders v. Clark*, 1 Ves. 10, per Lord Hardwicke; *Harding v. Glyn*, 1 Atk. 469; *Ray v. Adams*, 3 M. & K. 243, per Sir J. Leach; *Grieverson v. Kirsopp*, 2 Keen, 653; *Croft v. Adam*, 12 Sim. 639; *Re Hargrove's Trusts*, 8 Ir. Eq. 256.

(f) *Attorney-General v. Stephens* 3 M. & K. 347; *Re Richards*, 8 L. R. Eq. 119.

(g) *Edwards v. Grove*, 2 De G. F. & J. 222, per L. J. Turner; *Maberly v. Turton*, 14 Ves. 499.



cabilities may stand in the way (*h*); for, as Lord Kenyon laid down the rule strongly, if the trust can *by any* [\*836] *possibility* be exercised by the \* Court, the non-execution by the trustee shall not prejudice the *cestuis que trust* (*a*).

6. **Mode of execution.**—In what *mode* the Court will execute the power will vary according to the circumstances of the case.

**Where the settlor has prescribed a rule, the Court will adopt it.**—Where the discretion of the trustee is to be *governed by some rule*, or to be *measured by a state of facts, which the Court can enquire into as effectually as a private person*, then the Court can “look with the eyes of trustees,” and will substitute its own judgment for that of the individual (*b*).

Thus in *Gower v. Mainwaring* (*c*), John Mainwaring executed a trust deed, by which the trustees were to give the *re due* of the real and personal estate among the settlor’s *relations where they should see most necessity, and as they should think most equitable and just*. Two of the trustees died, and, the third refusing to act, it was discussed, how far the discretion of the trustees could be vicariously exercised by the Court. Lord Hardwicke said, “What differs it from the cases mentioned is this, that *here is a rule laid down for the trust*. Wherever there is a trust or power—for this is a mixture of both—I do not know that the Court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally* according to their discretion *without any object pointed out or rule laid down*, the Court interposes not; unless in case of a charity, which is different, the Court exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge of such necessity and occasions of the family: the Court can* (*d*) *judge of the necessity: that is a judgment to be made of facts*

(*h*) *Pierson v. Garnet*, 2 B. C. C. 46, *per* Lord Kenyon.

(*a*) *Brown v. Higgs*, 5 Ves. 505.

(*b*) *Hewett v. Hewett*, 2 Eden, 332; *Maberly v. Turton*, 14 Ves. 499.

(*c*) 2 Ves. 87.

(*d*) In Mr. Belt’s edition of *Vesey* there is the strange misprint of “*cannot judge*.”

existing, so that the Court can make the judgment as well as the trustees, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity," and his Lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the Master should enquire into, and consider how it might be most equitably and justly divided (e) (1).

**\* 7. How the Court will exercise the power where [\*837] the settlor has laid down no rule.** — Where the settlor has given *no rule* or *measure* by which the discretion is to be governed, the Court cannot in that case act upon mere caprice, but will execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit.

**Equality is equity.** — And upon ordinary occasions the Court proceeds upon the maxim, that *equality is equity* (n).

(e) 2 Ves. 110; and see *Liley v. Broom*, 7 Ves. 124; *Salusbury v. Hey*, 1 Hare, 580. *Denton*, 3 K. & J. 536; *Perry v. Turner*, 2 Ph. 493; *Izod v. Izod*, 32

2 Eq. Ca. Ab. 195; *Fordyce v. Beav.* 242; *Gray v. Gray*, 13 1st Ch. Rep. 404. *Bridges*, 2 Ph. 497; *Longmore v. Rep.* 404.

(1) **Construction of bequest to "poor relations."** — The execution of the power in this case in favor of the settlor's relations within the Statute of Distributions, according to their necessities, leads us to observe upon the construction of a *direct bequest* to a person's "poor or necessitous relations." It is commonly thought that the epithet "poor," "necessitous," or the like, is merely nugatory; but on examination there will appear to be considerable authority in favor of the contrary doctrine. It is perfectly settled, notwithstanding a case in which Lord Hardwicke is said to have held otherwise, (*Attorney-General v. Buckland*, cited 1 Ves. 231, Amb. 71,) that "relations," though accompanied with the words "poor," "necessitous," or the like, will be restricted to those within the Statute of Distributions. The only question, therefore, is whether *as among those within the statute* expressions of this kind will not be allowed their effect. In a case reported by Peere Williams (*Anon. case*, 1 P. W. 327), the bequest was to "*poor relations*," and the Countess of Winchelsea, one of the next of kin, was allowed a share, in regard the word "poor" was frequently used as a term of endearment and compassion rather than to signify indigence. It is evident that this case can have no application where the word "poor" is not of doubtful meaning, but is clearly to be taken in the sense of poverty and necessity. In *Widmore v. Woodroffe*, Amb. 636, the testator had given a third of the residue to be distributed "*amongst the most necessitous of his relations*." There was *only one relation within the Statute of Distributions*, and it was held that such relation was exclusively entitled. The only point decided, therefore, was, that the addition of the term "*neces-*

Thus in *Doyley v. Attorney-General* (b), a testator gave his real and personal estate to trustees upon trust to dispose thereof to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, *and* for such charitable uses and purposes [\*338] as they should also think \* most proper and convenient: and the power having devolved upon the Court, Sir J. Jekyll directed that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to charitable uses, the known rule that *Equality is equity* being, he said, the best rule to go by. He had no rule of judging of the merits of the testator's *relations*, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

8. **Words of gift and words of power distinguished.**— With respect to the subject under consideration, the cases in which the donor's intention is expressed in the form of a *gift*, may admit of distinction from those in which it is expressed in the form of a *power*.

(b) 2 Eq. Ca. Ab. 195. See *Down v. Worrall*, 1 M. & K. 561; but there the two sets of objects were connected not by "*and*," but by "*or*;" and *Doyley v. Attorney-General* was not cited: see V. C. Wood's observations, 3 K. & J. 538.

situous" would not extend the construction of the word "*relations*" to those out of the statute. Thus there appears to be no authority for holding the words to be nugatory *as among the relations within the statute*, while on the contrary side of the question there are, as we shall see, direct decisions. In *Brunsdon v. Woolredge*, Amb. 507, a testator gave 500*l.* to be distributed amongst his mother's *poor* relations, and Sir T. Sewell directed the fund to be distributed amongst the *poor* relations of the mother within the statute *who were objects of charity*. In *Mahon v. Savage*, 1 Sch. & Lef. 111, a testator gave 1000*l.* to be distributed amongst his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors. No instructions were left, and Lord Redesdale held, that Lynam, *one of the next of kin within the statute*, was not entitled to a share, unless he was a poor person at the time of the payment of the legacy. We may also add the dictum of Lord Thurlow in *Green v. Howard*, 1 B. C. C. 33:—"The word '*relations*,'" he said, "must be confined to the statute, but not always in the proportions of the statute: where the testator has said, to relations *according to their greater need*, the Court has shown particular favor to one." The argument that the Court cannot distinguish between the degrees of poverty as amongst the relations within the statute is also answered by the case of *Gower v. Mainwaring*, cited in the text, in which a direction for such a distinction was actually made.

**Upon trust for the children of A. as B. shall appoint.** — If a fund be limited “upon trust for the children of A. as B. shall appoint,” the construction is that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed (*a*). But the gift is subject to the exercise of the power, and, therefore, if the power be testamentary, the donee of the power may well appoint in favour of those who may be living at his death, to the exclusion of those who may have predeceased him (*b*). [And where the will creating the power of appointment contained a recital that the testator had already provided for his children (who were the objects of the power), and did *not intend thereby to make any further provision* for them, it was held that the power was not a power coupled with a trust, and that the children were not entitled in default of appointment (*c*).]

**Upon trust to dispose amongst the children of A.** — Where an estate is vested in trustees “upon trust to *dispose* thereof among the children of A.,” in this case the children take nothing by way of *gift*, but the transmission of their interest must be through the *medium* of the *power*. If the trust be to distribute *equally* among the objects, the bequest, though in the form of a power, must be tantamount to a simple gift (*d*); and if the trustees be at liberty to distribute *unequally*, and make no distribution, the Court itself executes the power, and divides the fund equally amongst the objects of it (*e*).

(*a*) *Davy v. Hooper*, 2 Vern. 665; *Fenwick v. Greenwell*, 10 Beav. 412; *Madoc v. Jackson*, 2 B. C. C. 588; *Hockley v. Mawbey*, 1 Ves. jun. 143, see 149, 150; *Jones v. Torin*, 6 Sim. 255; *Falkner v. Lord Wynford*, 9 Jur. 1006.

(*b*) *Woodcock v. Renneck*, 4 Beav. 196; 1 Ph. 72; and see *Lambert v. Thwaites*, 2 L. R. Eq. 151.

[(*c*) *Carberry v. McCarthy*, 7 L. R. Ir. 328.]

(*d*) *Phillips v. Garth*, 3 B. C. C. 64; *Rayner v. Mawbray*, Ib. 234.

(*e*) *Hands v. Hands*, cited *Swift v. Gregson*, 1 T. R. 437, note; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Powers, 650, 6th ed.; *Walsh v. Wallinger*, 2 R. & M. 78; *S. C. Taml.* 425; *Grieverson v. Kirsopp*, 2 Keen, 653; *Brown v. Pocock*, 6 Sim. 257; *Finch v. Hollingsworth*, 21 Beav. 112; *Re White's Trusts*, Johns. 656.

[\*839] \*9. **Discretion as to objects of the power.** — But, further, a discretion may be given to the trustee, not only in respect of the *proportions* to be appointed, but also in respect of the *objects* to whom the appointment is to be made; as where a fund is bequeathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

**Whether to be regarded as a trust or power.** — In the last case the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust*?

In *Harding v. Glyn* (*a*), a testator gave to Elizabeth his wife a house and certain goods and chattels, “but *desired* her at or before her death to give the same unto and among *such* of the testator’s relations as she should think most deserving and approve of.” The wife died without having made any appointment, and the Court considered a *trust* was created, and divided the estate equally amongst the testator’s relations living at the time of the wife’s death.

In *The Duke of Marlborough v. Lord Godolphin* (*b*), Lord Hardwicke held, in a similar case, that there was merely a *power* and no trust.

In *Brown v. Higgs* (*c*), on the contrary, where the introductory words used were, “I *authorise and empower*,” Lord Alvanley decided that there was a *trust*. The cause was reheard before his Lordship, and, after grave consideration on the subject, he decreed as before (*d*). The decree was afterwards affirmed on appeal by Lord Eldon (*e*), and again affirmed in the House of Lords (*f*).

**The doctrine of *Harding v. Glyn* now established.** — The doctrine of *Harding v. Glyn* has since been affirmed by other authorities (*g*), and may be now viewed as established. The

(*a*) 1 Atk. 469, S. C. stated from Reg. Lib. in *Brown v. Higgs*, 5 Ves. 501.

(*b*) 2 Ves. sen. 61.

(*c*) 4 Ves. 708.

(*d*) 5 Ves. 495.

(*e*) 8 Ves. 561, see p. 576.

(*f*) 18 Ves. 192.

(*g*) *Birch v. Wade*, 3 V. & B. 198; *Burrough v. Philcox*, 5 M. & Cr.

72; *Penny v. Turner*, 2 Ph. 493; *Walsh v. Wallinger*, 2 R. & M. 78; *Re Caplin*, 11 Jur. N. S. 383, 2 Dr. & Sm. 527; and see *Salisbury v. Denton*, 3 K. & J. 535; *Re White’s Trusts*, Johns. 656; *Re Eddowes*, 1 Dr. & Sm. 395; [*Pocock v. Attorney-General*, 3 Ch. D. 342; *Wilson v. Duguid*, 24 Ch. D. 244.]

rule has been thus laid down by Lord Cottenham: "When there appears a general intention in favour of *individuals* of a class to be *selected by another person*, and the *particular* intention fails from that selection not being made, the Court will carry into effect the *general* intention in favour of the class" (*h*).

10. **In favour of what objects the Court will exercise a power imperative.** — The question in favour of *what objects* a power *imperative*, whether of *distribution* merely, or of *selection*, will be executed by \* the Court, viz., whether [\*840] in favour of those *living at the death of the testator*, or those *living at the death of the donee of the power*, remains to be considered; and it is conceived that, in reference to this question, the following results may be deduced from the authorities:

**Case where an immediate exercise of the power is contemplated.** — First. Where a testator bequeaths property with a power *imperative* in favour of a class, whether of children, relations, or others, and it appears to be the intention that the distribution or selection should take place *as soon as conveniently may be* after the testator's death, then the Court will execute the power in favour of the class as existing at the date of the *testator's death* (*a*).

**Where an immediate exercise not contemplated.** — Secondly. Where the *frame* of the will does not of *necessity* point to an immediate exercise of the power, as where the donee of the power takes a *life estate* expressly, or by implication, the *nature of the power* given to the donee has to be taken into consideration:

*a. Where power testamentary.* — If the devise or bequest be in the form not of a gift, but of a power to be exercised by *will* only, then, inasmuch as the objects of the power are necessarily those only living at the death of the donee, the Court executes the power in favour of those members of the

(*h*) *Burrough v. Philcox*, 5 M. & Cr. 92.

(*a*) *Brown v. Higgs*, 4 Ves. 708, &c.; *Longmore v. Broom*, 7 Ves. 124. The result will, of course, be the same

where a life estate being given to the donee of the power, the donee dies in the testator's lifetime; see *Penny v. Turner*, 2 Ph. 493; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

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class only who are *in esse* at the death of the donee (b). But the rule applies only where the class take *through the medium of a power*, for if there be a gift to them in the first instance, in such shares, &c., as the donee of the power shall appoint by will, then, in default of exercise of the power, the whole class take, whether they survive the donee of the power or not (c).

**β. Where power not merely testamentary.**—Where the power given to the tenant for life is not merely testamentary, but may be exercised either by *deed or will*, the question, whether the class to take is to be ascertained at the death of the testator or of the donee of the power, is involved in still further difficulty. The decisions which support an execution of the power in favour of the class of objects as existing at the death of the donee (d), and those which support [\*841] an execution in favour \* of the class as existing at the death of the original testator (a), are almost evenly balanced; but the apparent absence of any full consideration of the question, and the circumstance that in some of the cases the power, though not expressly limited to an exercise by will, did not in terms authorise an execution by deed or writing, and may perhaps have been viewed by the Court as testamentary, detract from their value as authorities upon this point.

Upon principle, too, as well as upon authority, the question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exer-

(b) *Cruwys v. Colman*, 9 Ves. 319; *Birch v. Wade*, 3 V. & B. 198; *Walsh v. Wallinger*, 2 R. & M. 78; *Brown v. Pocock*, 6 Sim. 257; *Burrough v. Philcox*, 5 M. & Cr. 72; *Bonser v. Kinnear*, 2 Giff. 195; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Freeland v. Pearson*, 3 L. R. Eq. 658; [*Sinnott v. Walsh*, 5 L. R. Ir. 27;] and see the analogous cases of *Woodcock v. Renneck*, 4 Beav. 190; 1 Ph. 72; *Finch v. Hollingsworth*, 21 Beav. 112.

(c) *Lambert v. Thwaites*, 2 L. R. Eq. 151.

(d) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 195; *Harding v. Glyn*, 1 Atk. 469; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Pow. 650, 6th ed.

(a) *Hands v. Hands*, cited 1 T. R. 437, note; *Grieverson v. Kirsopp*, 2 Keen, 653; [*Wilson v. Duguid*, 24 Ch. D. 244.]

cised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the Court has to supply, is the non-exercise *just before the death*, and that default must, therefore, be supplied in favour of those who were objects at the date of the death of the donee (*b*). On the other hand, the donee of the power may exercise it in favour of the class existing at the time of exercise, to the exclusion of those who have died before, and, also, where the power is one of selection to the exclusion of those who may come into *esse* subsequently, but the *Court* cannot act arbitrarily, and cannot show any favour, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it, that is, those living at the death of the testator, and those who come into being during the continuance of the life estate (*c*); otherwise, should all the class predecease the tenant for life (an event not improbable, where *children* or some limited class of relations are the objects), there would be a power imperative which is construed as a trust, and no *cestui que trust*, a result which, it is conceived, the Court would be somewhat unwilling to adopt.

[In a recent case where there was a residuary bequest to A. with a direction that "the whole principal at her death was to be \*divided amongst her children, if [\*842] she had any, in such proportions as she should think fit," the late M. R. held, (1), that A. had a power of appointment, either by instrument *inter vivos*, or by will; and (2), that, as she did not exercise the power, her surviving child and the representatives of her children who had died in her lifetime were entitled to participate in the property (*a*). It

(*b*) See also observation by V. C. Wood in *Re White's Trusts*, Johns. 659, 660, a case different, however, from any of those discussed in the text, the donees of the power being

trustees, who both died before the tenant for life.

[(*c*) See *Wilson v. Duguid*, *ubi supra*.]

[(*a*) *Re Jackson's Will*, 13 Ch. D. 189.]

is observable that the power in this case was only one of distribution; but in a still later case (*b*), where the power was one of selection and distribution, the objects who had died in the lifetime of the donee of the power were held entitled to participate; but the decision in the latter case was also based upon other grounds. The cases in which an intention appears that there should be a *personal enjoyment* by the objects of the power stand on a different footing, and in these cases there is good ground for holding that the object must survive the donee of the power in order to participate (*c*); but apart from any such indication it is conceived that the true principle is that all persons in whose favour the power could at any time have been exercised are objects, and that they all are equally entitled to participate.]

*γ. Whole purview of instrument must be regarded.* — It is clear that where the donee tenant for life may exercise the power by *deed or will*, the members of the class in existence at the date of the death of the donee will alone take, if, upon the purview of the original instrument, they alone appear to be the objects of the power (*d*).

**11. Construction of the word "relations."** — **Power of selection and power of distribution.** — Where there is a power of appointment in favour of "relations," the *donee* of the discretion, if he have a power of *selection*, may appoint to relations in any degree (*e*), and it is only in those cases where he has a mere power of *distribution* that he must confine himself to the relations within the Statute of Distribution of Intestate's Estates (*f*). But the Court, except where

[*b*] *Wilson v. Duguid*, 24 Ch. D. 244.]

[*c*] *Re White's Trusts*, Johns. 656; *Re Phene's Trusts*, 5 L. R. Eq. 340.]

[*d*] *Winn v. Fenwick*, 11 Beav. 438; and see *Tiffin v. Longman*, 15 Beav. 275.

[*e*] *Supple v. Lowson*, Amb. 729; *Grant v. Lynar*, 4 Russ. 292; *Harding v. Glyn*, 1 Atk. 469; S. C. stated from Reg. Lib., *Brown v. Higgs*, 5 Ves. 501; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Cruwys v. Colman*, 9 Ves. 324, *per* Sir W. Grant; *Spring v.*

*Biles*, cited *Swift v. Gregson*, 1 T. R. 435, note (*f*); *Salisbury v. Denton*, 3 K. & J. 536; *Snow v. Teed*, 9 L. R. Eq. 622. In *Brunsdon v. Woolledge*, Amb. 507, Sir T. Sewell seems (contrary to his opinion in *Supple v. Lowson*, *ubi supra*) to have confined the trustees to relations within the statute.

[*f*] *Isaac v. Defriez*, Amb. 595; but see the case cited from Reg. Lib., *Attorney-General v. Price*, 17 Ves. 373, note (*a*); *Carr v. Bedford*, 2 Ch. Rep. 146; *Lawlor v. Henderson*, 10

the bequest \* is for the benefit of *poor relations* by way [\*843] of founding a charity (*a*), or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained (*b*), must in all cases appoint to the relations within the statute; for as on the one hand the Court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum* (*c*).

12. **Whether relations shall take *per stirpes* or *per capita*.**— A further point open to discussion is, in what *shares* such relations shall take, — whether those who in case of intestacy would have claimed by representation shall under the execution of the power by the Court take *per stirpes* or *per capita*.

Now; the rule that those are deemed relations who would take a distributive share under the statute was adopted on the ground, that, unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void for uncertainty. As this was the sole foundation for appealing to the statute at all, it is evident the single enquiry for the Court is, *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beyond the Court's jurisdiction; for, when the class has been ascertained, the testator himself has deter-

I. R. Eq. 150; *Pope v. Whitcombe*, 3 Mer. 689. The last case, and *Forbes v. Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a *power*, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of selection will be implied in a case of "relations," where it would not have been implied in the case of "children"; *Spring v.*

*Biles*, cited 1 T. R. 435, note (*f*); *Mahon v. Savage*, 1 Sch. & Lef. 111; *Salisbury v. Denton*, 3 B. & J. 536. In the last two cases the words were "*amongst* the relations," but see *Pope v. Whitcombe*, 3 Mer. 689, where the expression was similar.

(*a*) See *White v. White*, 7 Ves. 423; *Attorney-General v. Price*, 17 Ves. 371; *Isaac v. De Friez*, *ib.* 373, note (*a*); and see *Mahon v. Savage*, 1 Sch. & Lef. 111.

(*b*) *Bennett v. Honeywood*, Amb. 708.

(*c*) Thus in *Bennett v. Honeywood*, *ubi supra*, 456 persons applied as relations within two years.

mined the proportions by devising to the objects in words creating a joint tenancy (*d*). No distinction can be taken between real and personal estate; yet it could scarcely be held, that if *lands* were devised to the testator's "relations," the kindred within the statute would take in unequal proportions.

**Principle to be extracted from the cases.**—The result of the authorities would seem to accord with what is correct upon principle, viz., that *in a gift to "relations" (whether the testator has added the words "equally to be divided" or not), the distribution among the relations within the statute must be made per capita, and not per stirpes (e).* The [\*844] question can no longer arise \*where the gift is to "next of kin," for by decision of *Elmsley v. Young*, upon appeal from Sir J. Leach to the Lords Commissioners (*a*), the words "next of kin" must be construed to mean "nearest of kin," to the exclusion of those who would take under the statute by representation.

**13. Subject of the gift incapable of division.**—We have stated that, as a general principle, the Court will execute the power among the objects *equally*; but it sometimes happens that the subject of the gift is *incapable of division*, or the settlor has expressly directed the whole to be bestowed on *one* object to be selected by the trustee. In such cases the Court still acts upon the maxim, that, if *by any possibility* the power can be executed the Court will do it.

In *Moseley v. Moseley (b)*, a very early case, an estate was devised to trustees upon trust to settle on *such (i.e. on such one)* of the sons of N. as the trustees should think fit. The trustees having neglected to comply with the direction,

(*d*) See *Walker v. Maunde*, 19 Ves. 427, 428.

(*e*) See *Thomas v. Hole*, Cas. t. Talb. 251; *Stamp v. Cooke*, 1 Cox, 236; *Phillips v. Garth*, 3 B. C. C. 64; *Green v. Howard*, 1 B. C. C. 33; *Rayner v. Mowbray*, 3 B. C. C. 234, Reg. Lib. B. 1791, fol. 183; *Pope v. Whitcombe*, 3 Mer. 689, Reg. Lib. B. 1809, fol. 1535; *Hinckley v. Maclarens*, 1

M. & K. 27; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; *Fielden v. Ashworth*, 20 L. R. Eq. 410. The above cases are discussed in Append. No. IX. to 3d edit.

(*a*) 2 M. & K. 780; and see *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215.

(*b*) Rep. t. Finch, 53; S. C. cited *Clarke v. Turner*, Freem. 199.

the sons of N. filed a bill to have the benefit of the trust, and the Court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of the plaintiffs as they should think fit, upon whom to settle the lands of the testator; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the Court would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

In *Richardson v. Chapman* (c), Dr. Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof "regard should be had according to their discretion to his eldest son, his sons in law, his present and former chaplains, and others his domestics, particularly Dr. T., his chaplain, and Dr. H., his librarian; also to his worthy friends and acquaintance, particularly to Dr. Richardson." The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr. Venner. On a bill filed to set aside the presentation, Lord Northington considered \* the trust to be of a kind [\*845] that the Court could not execute, and dismissed the bill. Dr. Richardson appealed against this decision to the House of Lords, and the other person, who stood prior to him, not appearing, the House reversed the decree, and ordered the presentation to be made to the appellant. "This case," says Lord Alvanley, "shows, that however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was

(c) 7 B. P. C. 318; S. C. cited *Brown v. Higgs*, 5 Ves. 504, 505.

to make the selection, it is decisive to show the Court must do it, though the trust is in its nature so discretionary" (*a*).

(*a*) *Brown v. Higgs*, 5 Ves. 504. In this case (see 4 Ves. 718, 719; 5 Ves. 508), an estate was devised "to one of the sons of Samuel Brown as John Brown should direct by a conveyance in his lifetime, or by his last will and testament;" and John Brown not having executed the power, Lord Alvanley was inclined to think,

though he would not decide the point, that the children of Samuel Brown could not establish a claim; but the ground of this opinion was not that a *trust* had been created which the Court could not execute, but that the intention of the testator as collected from the will was to communicate a *mere power*.

THE RIGHTS OF A CESTUI QUE TRUST IN PREVENTION OF  
BREACH OF TRUST.

As the estate of the *cestui que trust* depends for its continuance upon the faith and integrity of the trustee, it is reasonable that the *cestui que trust*, whose interest is thus materially concerned, should be allowed by all practical means to secure himself against the occurrence of any act of misconduct. We shall, therefore, next consider the rights of the *cestui que trust* that are calculated to arm him with this protection.<sup>1</sup>

<sup>1</sup> *The removal of trustees.* — The *cestui que trust* and all others in interest are entitled to have the trust property in the hands of proper custodians, and to have a sufficient number of them; *Cooper v. Day*, 1 Rich. Eq. 26; *Greene v. Borland*, 4 Met. 330; *Dixon v. Homer*, 12 Cush. 41; *Hospital v. Amory*, 12 Pick. 445; if a trustee moves away, or for any reason cannot continue to perform his duties, he may be removed; *Curtis v. Smith*, 60 Barb. 9; *Lill v. Neafie*, 31 Ill. 101; *Ketchum v. Railroad*, 2 Woods, 532; *Farmers' Loan & Trust Co. v. Hughes*, 11 Hun, 130; *Dorsey v. Thompson*, 37 Md. 25; *Brown v. Strickland*, 28 Ga. 387; likewise if he is guilty of misconduct; *Thompson v. Thompson*, 2 B. Mon. 161; *Re Wiggins*, 29 Hun, 271; or conducts the estate to his own profit; *Clemens v. Caldwell*, 7 B. Mon. 171; or if a husband as trustee is guilty of cruelty; *Smyth v. Oliver*, 31 Ala. 39; *Kraft v. Lohman*, 79 Ala. 323; but see *Abernathy v. Abernathy*, 8 Fla. 243; or if he becomes a lunatic; *In re Wadsworth*, 2 Barb. Ch. 381; or a drunkard; *Bayles v. Staats*, 1 Halst. Ch. 513; *Fisk v. Stubbs*, 30 Ala. 335; or if money is not invested properly or as desired; *Deen v. Cozzens*, 7 Rob. (N. Y.) 178; *Lewis v. Cook*, 18 Ala. 335; *Cavender v. Cavender*, 114 U. S. 464; or if the trust property is endangered; *Matthews v. Murchison*, 17 Fed. Rep. 766; *Nickels v. Philips*, 18 Fla. 732; *Harper v. Straws*, 14 B. Mon. 57; *Scott v. Rand*, 118 Mass. 215; *Sparhawk v. Sparhawk*, 114 Mass. 358; in most of these cases proper and regular proceedings for removal must be taken, up to which time the trustee may continue to act; *Howard v. Waters*, 19 Md. 529; *People v. Norton*, 5 Seld. 176; *Hodgdon v. Shannon*, 44 N. H. 572. If a trustee is appointed for a certain time, his duties end with the expiration of the time as a matter of course; *Webb v. Neal*, 5 Allen, 575. A mistake or misjudgment is insufficient ground for removal; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *In re Durfee*, 4 R. I. 401; so is a disagreement between the trustee and *cestui que trust*; *Gibbes v. Smith*, 2 Rich. Eq. 131; *Clemens v. Caldwell*, 7 B. Mon. 171. Courts will not discharge trustees against the wishes of the *cestui que trust* when proceedings are pending to com-



**Cestui que trust entitled to appointment of proper trustees. —**

*First.* The *cestui que trust* is entitled to have the custody

pel them to sell land; Longstreth's Est. 12 Phila. 86; the calling in of funds well invested by the trustee, that he may use them in his own business is not sufficient unless *mala fides* is shown; Massey v. Stout, 4 Del. Ch. 274; but a refusal to join in a conveyance because it would interfere with his own advantage to be derived therefrom is sufficient; *Re Frisbie*, 3 Dema. (N. Y.) 22; *Re Morgan*, 3 Dema. (N. Y.) 612; a trustee appointed by the Court *ex parte* may be removed on the application of an interested party; *Re Mayfield*, 17 Mo. App. 684; in proceedings for removal, all the beneficiaries must be made parties; *Bear v. American Rapid Tel. Co.* 36 Hun, 400; one denying that he is a trustee should be removed and a new one appointed; *Irvine v. Dunham*, 111 U. S. 327; a trustee may be removed for cause shown, and if the trust estate is in jeopardy, no additional cause is necessary; *Hilles' Est.* 13 Phila. (Pa.) 402; a non-resident alien may be removed, though he never signified his acceptance, nor assumed the duties of trustee; *Lane v. Lewis*, 4 Dema. (N. Y.) 468; charges against a testamentary trustee must be specific and certain, not vague and indefinite, in order to remove him; *Ferris v. Ferris*, 2 Dema. (N. Y.) 336; a trustee may be removed for neglect; *Stevens v. Eldridge*, 4 Cliff. C. C. 348; a trustee may be removed because of waste; *Mandel v. Peay*, 20 Atk. 325; *Lucich v. Medin*, 3 Nev. 93; if a trustee is incapable of acting, an enabling act might be passed; *Fellows v. Miner*, 119 Mass. 541; *Williams's App.* 73 Pa. St. 249; incompetency or dishonesty is sufficient ground for removal; *Savage v. Gould*, 60 How. Pr. 234; ill-will and unnatural dislike may be; *McPherson v. Cox*, 96 U. S. 404; a trustee may not, without his consent, be removed from the management of a part of the trust property only; *Sturges v. Knapp*, 31 Vt. 1. Removal of trustee is in discretion of the Court when the *cestui que trust* requests it; *Ward v. Dortch*, 69 N. C. 279; good cause must be shown; *Stevenson's App.* 68 Pa. St. 101; refusal of trustee to exercise his discretionary powers may be a ground for removal; *Atty.-Gen. v. Garrison*, 101 Mass. 223; illiteracy, poverty, immoral conduct, and misunderstanding are not; *Emerson v. Bowers*, 14 N. Y. 449; *Stephenson v. Stephenson*, 4 Jones, L. 472; *Berry v. Hamilton*, 12 B. Mon. 191; *Fairbairn v. Fisher*, 4 Jones, Eq. 390; *Gregg v. Wilson*, 24 Ind. 227; neither is the non-residence of the trustee; *Cutler v. Howard*, 9 Wis. 309; *Jones v. Jones*, 12 Rich. 623; *Ex parte Barker*, 2 Leigh, 719; but see *Maxwell v. Finnie*, 6 Cold. 434; costs of proceedings to remove on account of trustees leaving the state are to be paid out of the trust estate; *Bloomer's App.* 83 Pa. St. 45. A trustee may not be removed for a breach of trust or failure to do his duty, if the trust property is not thereby endangered; *Lathrop v. Smalley*, 23 N. J. Eq. 192; especially if the *cestuis que trust* do not wish it; *Berry v. Williamson*, 11 B. Mon. 245. Trustee may not remove from the state without accounting; *Harris v. Dillard*, 31 Ala. 191. There are numerous other causes for removal; *Quackenboss v. Southwick*, 41 N. Y. 117; *Preston v. Wilcox*, 38 Mich. 578; *Holcomb v. Coryell*, 12 N. J. Eq. 289; *Re Clute*, 80 N. Y. 651; *Belknap v. Belknap*, 5 Allen, 468; *Johnson's App.* 9 Barr, 416; *Cooper v. Day*, 1 Rich. Ch. 26; *Piper's App.* 20 Pa. St. 67.

*Bankruptcy of trustees.* — The bankruptcy or insolvency of a trustee does not ordinarily interfere with his fiduciary relation; *Belknap v. Belknap*, 5 Allen, 468; *Shryock v. Waggoner*, 28 Pa. St. 430; *Cooper v. Cooper*, 5 N. J. Eq. 9; *Dwight v. Simon*, 4 La. Ann. 490.

and administration of the estate confided to the care both of *proper persons* and of a *proper number* of such persons.

*Resignation of trustee.*—Generally trustees should have some good reason for relinquishing their trusts; *Jones v. Stockett*, 2 Bland, 409; *Cruger v. Halliday*, 11 Paige, 314; *Craig v. Craig*, 3 Barb. Ch. 76; but if they are serving for no limited period and without pay they may retire at any time when the duties become burdensome or inconvenient; *Bogle v. Bogle*, 3 Allen, 158; if a trustee resign for his own convenience he should bear the expense of the change; *In re Jones*, 4 Sandf. Ch. 615. The appointment, removal or substitution of a trustee will come under the jurisdiction of courts of equity in some cases, in others under that of probate courts; *In re Eastern R. R.* 120 Mass. 412; *Bowditch v. Banuelos*, 1 Gray, 220; *De Peyster v. Clendinning*, 8 Paige, 295; if he be an executor, the latter will, of course, have special jurisdiction; *Quackenboss v. Southwick*, 41 N. Y. 117; *Leggett v. Hunter*, 25 Barb. 81.

*Substitution of trustees.*—Proceedings may be begun by parties in interest upon notice to all other interested parties; *Bradstreet v. Butterfield*, 129 Mass. 339; *Abbott*, Petr. 55 Me. 580; *Re Ballou*, Petr. 11 R. I. 360; *Guion v. Melvin*, 69 N. C. 242; *Re Livingston*, 34 N. Y. 567; *Hawley v. Ross*, 7 Paige, 103; *Howard v. Gilbert*, 39 Ala. 726; in some cases the trust property vests in the trustee without a direct conveyance to him; *Webster Bank v. Eldridge*, 115 Mass. 424; *Ellis v. Boston H. & E. R. R.* 107 Mass. 1; *Gibbs v. Marsh*, 2 Met. 243; *Burdick v. Goddard*, 11 R. I. 516; in others such a conveyance is necessary; *Crosby v. Huston*, 1 Tex. 203; *Foster v. Goree*, 4 Ala. 440. If any of the interested parties are not *sui juris* a decree of court is absolutely necessary in substituting trustees unless the trust instrument provides for it; *Cruger v. Halliday*, 11 Paige, 314.

*Power of appointment.*—This cannot be exercised except by those to whom it is directly given, or by the courts; *Wilson v. Towle*, 30 N. H. 129; *Shea v. Dulin*, 3 MacArthur, 339; if given to a particular class of persons, it can be exercised by the survivors of the class; *McKim v. Handy*, 4 Md. Ch. 230; *Davoue v. Fanning*, 2 Johns. Ch. 252. If the appointment is left to the discretion of any persons, the courts will not interfere; *Bowditch v. Banuelos*, 1 Gray, 220; the *cestui que trust* should be consulted in making appointments; *Naglee's Est.* 52 Pa. St. 154; a woman may appoint her own husband as a trustee; *Tweedy v. Urquhart*, 30 Ga. 446.

*Number of trustees.*—If retiring trustees have a power of appointment, they should not appoint one trustee merely, but as many as there are vacancies in the original number; *Mass. Gen. Hosp. v. Amory*, 12 Pick. 445; but the power may allow them the privilege of determining the number of new trustees; *Hammond v. Granger*, 128 Mass. 272; *Atty.-Gen. v. Barbour*, 121 Mass. 568; *Greene v. Borland*, 4 Met. 330.

*In the provinces.*—The court will not without some special reason appoint one trustee in the place of three; *Kingsmill v. Miller*, 15 Chy. 171; where the court appoints a new trustee it will be satisfied with one; *In re Dillon's Trusts*, 3 L. J. N. S. 126 Chy.; a release by an executor does not release him as trustee; *Berringer v. Hiscote*, 60 S. 23; if a master favored reducing number of trustees, he should so report to the court; *Proudfoot v. Tiffany*, 11 Chy. 461; see also in reference to the appointment of new trustees, *Lyon v. Radenhurst*, 5 Chy. 544; *In re De Laronde*, 19 Chy. 119; *Pegley v. Atkinson*, 20 Chy. 383; *In re Halliwell's Trusts*, 21 Chy. 346; *Lucas v. Hamilton Real*

1. **Trustee dying in testator's lifetime.** — Thus, if the trustee originally appointed by a will happen to die in the testator's lifetime, the *cestui que trust*, where such a course would be for his interest, may have the property better secured by a conveyance to an express trustee for himself; and where a testator did not appoint a trustee at all, but only appointed executors, the Court asserted an inherent jurisdiction of its own to appoint trustees to take charge of the fund (a).

2. **Death of trustees after having acted.** — So, where the original number of trustees has become reduced by deaths, the *cestui que trust* may restore the property to its original security by calling for the appointment of new trustees in the place of the trustees deceased (b); and even a *cestui que trust* in remainder may take proceedings to have the proper number of trustees filled up (c), and under the new practice the

Court has appointed new trustees upon an action by [\*847] infant *cestuis que trust* without any \* statement of

(a) *Dodkin v. Brunt*, 6 L. R. Eq. 580; [and see Appendix, *post*, sect. 9 of the Trustee Extension Act, and the cases cited in the note thereto.]

(b) *Buchanan v. Hamilton*, 5 Ves. 722; *Hibbard v. Lamb*, Amb. 309.

(c) *Finley v. Howard*, 2 Dru. & War. 490.

*Est. Asso.* 26 Chy. 384; *Magee v. Osborne*, 7 O. R. 297; *Wright v. Robertson*, 3 Kerr (N. B.) 78; *Moffatt v. Thompson*, 1 P. B. (N. B.) 516.

Where one trustee died, and another was removed for misconduct, it was held that the remaining trustee was discharged; *Mitchell v. Richey*, 13 Chy. 445; the insolvency of a trustee or his leaving in debt to reside abroad, is a sufficient ground to remove him from the trust; *Gray v. Hatch*, 18 Chy. 72.

*Rights of cestui que trust.* — He may proceed against the trustee directly if he chooses; *Calhoun v. Burnett*, 40 Miss. 599; *Freeman v. Cook*, 6 Ired. Eq. 379; *Roberts v. Mansfield*, 38 Ga. 452; yet he must elect to proceed against the trustee or the property if the latter can be traced; *Baker v. Disbrow*, 3 Redf. 348; *Barker v. Barker*, 14 Wis. 131. Ordinarily the remedy is an equitable one; *Brooks v. Brooks*, 11 Cush. 18; *Hearne v. Hearne*, 55 Me. 445; *Dorsey v. Garey*, 30 Md. 489; *Dill v. McGehee*, 34 Ga. 438; but actions at law will lie in some instances; *Prescott v. Ward*, 10 Allen, 203; *New York Ins. Co. v. Roulet*, 24 Wend. 505; *Hall v. Harris*, 3 Ired. Eq. 389; *Penobscot R. R. Co. v. Mayo*, 60 Me. 306; *Catlin v. Birchard*, 13 Mich. 110; *Beaches v. Dorwin*, 12 Vt. 139. If a trustee embezzle trust funds, he may be indicted therefor; *Shaw v. Spencer*, 100 Mass. 388. Where a trustee sells improperly, he may be held liable for the highest possible value of the property; *Melick v. Voorhees*, 2 N. J. Eq. 305; or the *cestui que trust* may compel him to purchase other property of equal value; *Norman v. Cunningham*, 5 Gratt. 72; *Oliver v. Piatt*, 3 How. 333.

claim upon an admission in the statement of defence by the sole trustee that she was willing to retire (a).

3. **Trustee refusing to act, becoming incapable, or misconducting himself, &c.**—If a trustee refuse to act (b), or become so circumstanced that he cannot effectually execute the office (as where a trustee goes *abroad* to reside permanently (c), or the trustees of a chapel entertain opinions *contrary to the founder's intention* (d)), or if a trustee of money become *bankrupt* (e), or if a trustee *misconduct* himself in any manner (f) (as by dealing with the trust property for his own *personal advancement* (g), by suffering a co-trustee to commit a *breach of trust* (h), or by *absconding* on a charge of forgery (i)); in these and the like cases the *cestui que trust* may have the old trustee removed, and a new trustee ap-

(a) *Mooney v. Summerlin*, W. N. 1876, p. 90.

(b) *Maggeridge v. Grey*, Nels. 42; *Travell v. Danvers*, Rep. t. Finch, 380; *Wood v. Stane*, 8 Price, 613; *Anon.* 4 Ir. Eq. Rep. 700.

(c) *O'Reilly v. Alderson*, 8 Hare, 101; *Re Ledwich*, 6 Ir. Eq. Rep. 561; *Commissioners of Charitable Donations v. Archbold*, 11 Ir. Eq. Rep. 187.

(d) *Attorney-General v. Pearson*, 7 Sim. 290, see 309; *Attorney-General v. Shore*, Ib. 309, see 317.

(e) *Bainbrigg v. Blair*, 1 Beav. 495; *Re Roche*, 1 Conn. & Laws. 306; *Commissioners of Charitable Donations v. Archbold*, 11 Ir. Eq. Rep. 187; *Harris v. Harris* (No. 1), 29 Beav. 107; *Re Barker's Trusts*, 1 Ch. D. 43, in which case M. R. observed: "It is the duty of the Court to remove a bankrupt who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions under special circumstances to that general rule. And it may also be, that where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt, but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man

is more likely to be tempted to misappropriate than one who is wealthy; and, besides, a man who has not shown prudence in managing his own affairs, is not likely to be successful in managing those of other people."

An exception to the general rule was made in *Re Bridgman*, 1 Dr. & Sm. 164, where a trustee became bankrupt, but without any imputation on his moral character, and had been honorably unfortunate, and but for an accident would have been solvent, and had been treated by all parties since his bankruptcy as a proper person to manage the trust. If the trustee compound with his creditors, the same rule applies as in bankruptcy, for the *cestuis que trust* have equally a right to have the administration of the trust estate committed to responsible persons; [*Re Adams' Trust*, 12 Ch. D. 634; and see *Re Hopkins*, 19 Ch. D. 61.]

(f) *Mayor of Coventry v. Attorney-General*, 7 B. P. C. 235; *Buckridge v. Glasse*, Cr. & Ph. 126, see 131.

(g) *Ex parte Phelps*, 9 Mod. 357.

(h) *Ex parte Reynolds*, 5 Ves. 707.

(i) *Millard v. Eyre*, 2 Ves. jun.

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pointed in his room. And in such a suit it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute to him any corrupt or improper motive in the execution of the trust, or to allege that his behaviour is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it will be impertinent, and may be scandalous, to state circumstances of *general malice* or personal hostility (*j*). And if the old trustee be removed on the ground of *misconduct*, he [\*848] must bear the expense of \*the appointment of a new trustee, as an act necessitated by himself (*a*). But where the instrument creating the trust contemplates the possibility of a single trustee being appointed to act alone, and the power of appointing new trustees is given to the trustees or trustee for the time being, it is not a breach of trust in the last surviving trustee to refuse to appoint another trustee to act with himself, and an action to compel him to do so, if not sustainable on other grounds, will be dismissed with costs.<sup>1</sup>

[4. **Trustee removed where it is to the advantage of the trust.** — The jurisdiction of a Court of equity to remove a trustee is ancillary to its principal duty, to see that the trusts are properly executed. And therefore, though charges of misconduct are not made out, or are greatly exaggerated, the Court may, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, remove the trustee, as the trustees exist for the benefit of those to whom the creator of the trust has given the trust estate (*b*).]

5. **Trust property under administration by the Court.** — If the trust property be under administration by the Court, and the surviving trustee dies, the appointment of other trustees is not matter of course, but rests in the discretion of the Court, having regard to the state of the trust at the time (*c*); and if liberty has been given by a former order to apply at

(*j*) *Earl of Portsmouth v. Fellows*, 5 Mad. 450.

[(*b*) *Letterstedt v. Broers*, 9 App. Cas. 371, 386.]

(*a*) *Ex parte Greenhouse*, 1 Mad. 92.

(*c*) *Ryan v. Stockdale*, W. N. 1875, p. 106.

<sup>1</sup> *Peacock v. Colling*, 33 W. R. 528, 54 L. J. Ch. 743, C. A.

chambers, and the parties present a petition instead of applying at chambers for the appointment of new trustees, the petitioners will be disallowed their costs (*d*).

6. **Trustees required to be "inhabitants."**—If the settlement require the trustees of a charity to be *inhabitants of a particular place*, it is irregular to appoint persons trustees who do not answer that description, provided at the time of the election there be any inhabitants proper to be trustees (*e*). But where it has been the custom to appoint trustees not being inhabitants, the Court will not *remove* the existing trustees, though it will take care that the founder's directions shall be better observed for the future (*f*); and generally, though trustees may have been appointed irregularly in the first instance, their removal cannot be demanded after acquiescence for a great number of years (*g*). And in the selection of trustees of charities the Court enquires whether the parties proposed are *proper persons*, not whether they are the *most proper* that could be found (*h*).

[7. Where the administration of a charity had been committed by the settlor to the lord provost and town council of Edinburgh and the ministers of the burgh, but for a long period the \*administration had been solely in [\*849] the hands of the provost and council, it was held that, notwithstanding the length of time during which a contrary practice had prevailed, the ministers must in future be admitted as joint administrators of the charity (*a*).]

8. **Trustee not to be dismissed from caprice.**—The Court will not dismiss a trustee for the mere *caprice* of the *cestui que trust* without any reasonable cause shown (*b*), or because the trustee has *refused* from *honest motives* to exercise a

(*d*) *Bund v. Green*, W. N. 1875, p. 213.

(*e*) *Attorney-General v. Cowper*, 1 B. C. C. 439. As to the force of the word "residence," see *Blackwell v. England*, 3 Jur. N. S. 1302; *Attenborough v. Thompson*, 2 H. & N. 559.

(*f*) *Attorney-General v. Stamford*, 1 Ph. 737; *Attorney-General v. Clifton*, 32 Beav. 596; *Attorney-General v. Daugars*, 33 Beav. 621.

(*g*) *Attorney-General v. Cuming*, 2 Y. & C. C. C. 139, see 150.

(*h*) *Lancaster Charities*, 7 Jur. N. S. 96.

[(*a*) *The Lord Provost, &c. of Edinburgh v. The Lord Advocate*, 4 App. Cas. 823.]

(*b*) *O'Keefe v. Calthorpe*, 1 Atk. 18; and see *Pepper v. Tuckey*, 2 Jon. & Lat. 95.

*power* at the request of a tenant for life (c), or because a *dissension* has arisen between the trustee and one of the *cestuis que trust* (d), or because a *cestui que trust* puts forward a claim which may be unfounded that property of the trustee ought to be brought into the settlement (e), or because the trustee has transgressed the *strict line* of his duty, provided there was *no wilful default*, but merely a *misunderstanding* (f). Where, however, a trustee pertinaciously insisted on being continued in the office, though his co-trustees were unwilling to act with him, Lord Nottingham said, "He liked not that a man should be ambitious of a trust when he could get nothing but trouble by it," and without any reflection on the conduct of the trustee, declared he should meddle no further in the trust (g).

9. In appointing new trustees the Court will not give them a power of appointing other trustees. — As the substitution of a trustee by the Court proceeds upon a full consideration of the case, and is never made unless the Court is satisfied as to the fitness of the person proposed, it cannot be expected that the Court should, when appointing new trustees and directing the trust property to be conveyed to them, authorize the insertion of a *power* in the conveyance, enabling the new trustees to *nominate other trustees* in their stead as often as occasion may require: this would plainly be an abandonment by the Court of its own jurisdiction — a delegation of it to the care and judgment of individuals. Accordingly, notwithstanding some previous fluctuation in the practice (h), it is now settled that, except in charity cases (i), the Court will not authorise the insertion of such a power in the deed of conveyance (j).

(c) *Lee v. Young*, 2 Y. & C. C. C. 532.

(d) *Forster v. Davies*, 4 De G. F. & J. 133.

(e) S. C.

(f) See *Attorney-General v. Coopers' Company*, 19 Ves. 192; *Attorney-General v. Caius College*, 2 Keen, 150.

(g) *Uvedale v. Ettrick*, 2 Ch. Ca. 130.

(h) *Joyce v. Joyce*, 2 Moll. 276; *White v. White*, 5 Beav. 221.

(i) *Attorney-General v. Hurst*, M.

R. Dec. 2, 1791, Reg. Lib. A. 1791, f. 487; see the decree, stated Seton's Dec. 4th ed. p. 585; *In the matter of* 52 G. 3, c. 101, 12 Sim. 262; *Re Lovett's Exhibition*, Sidn. Suss. Coll. Camb. cor. V.C. Knight Bruce, Dec. 20, 1849.

(j) *Bayley v. Mansell*, 4 Madd. 226; *Brown v. Brown*, 3 Y. & C. 395; *Southwell v. Ward*, Tam. 314; *Bowles v. Weeks*, 14 Sim. 591; *Oglander v.*

\* 10. **Rules for selecting new trustees.** — In appoint- [\*850]  
ing new trustees the Court does not act arbitrarily,  
but upon certain general principles. *First*, the Court has  
regard to the *wishes of the author of the trust*, whether actu-  
ally expressed in the instrument, or plainly deducible from  
it; and if he has declared a particular person not fit to be  
appointed a trustee, the Court will refrain from appointing  
him. *Secondly*, the Court will not appoint a new trustee  
with a view to the interest of some of the parties beneficially  
interested, in opposition to the wishes of others; for a trust-  
tee ought to hold an *even hand as between all parties*, and  
not favour a particular class. And, *thirdly*, the Court has  
regard to the nature of the trust, and the question by whose  
instrumentality it can *best be carried into execution (a)*.

11. **Statutory powers.** — The exercise by the *cestui que*  
*trust* of his right to have the custody of the trust estate con-  
fided to a proper number of duly qualified trustees has been  
greatly facilitated by various statutes enabling him to obtain,  
in certain cases, the removal of unfit trustees, and the ap-  
pointment of others in their room, and also the appoint-  
ment of new trustees where the office is merely vacant;  
and this by a cheaper and more summary proceeding than  
by action.

[12. 46 & 47 Vict. c. 147. — By the last Bankruptcy Act,  
46 & 47 Vict. c. 52, s. 147, which in substance re-enacted  
the 117th section of the Bankruptcy Act, 1869, it is enacted,  
that “where a *bankrupt* is a trustee within the Trustee Act,  
1850, sect. 32 of that Act shall have effect so as to authorise  
the appointment of a new trustee in substitution for the  
bankrupt (whether voluntarily resigning or not) if it appears  
expedient so to do” (b). Under this section the Court  
will, as a general rule, remove a trustee where the bank-  
ruptcy is recent, and it is not shown that the bankrupt is

Oglander, 2 De G. & Sm. 381; Holder  
*v. Durbin*, 11 Beav. 504, in which last  
case Lord Langdale, M.R., in defer-  
ence to the views of the other judges,  
declined to follow his own previous  
decision in *White v. White*.

(a) *Re Tempest*, 1 L. R. Ch. App.  
485; 12 Jur. N. S. 539.

(b) For the law under the previous  
Bankruptcy Act, 12 & 13 Vict. c. 106,  
repealed by 32 & 33 Vict. c. 83, s. 20,  
see the 5th edition of the *Law of*  
*Trusts*, p. 607.



of good character, and has since his bankruptcy acquired means (c).]

13. **2 W. 4, c. 57, s. 3.** — By 2 Wm. 4, c. 57, s. 3, it was enacted that in case of the death of the trustee in whom any real property might have been vested in trust for any *charity*, the Court of Chancery might upon *petition* appoint new trustees, and direct the estate to be vested in them upon the charitable trusts.

[\*851] **\*14. 5 & 6 W. 4, c. 76, s. 71.** — By 5 & 6 Wm. 4, c. 76, s. 71 (the Municipal Corporations Act), it was enacted that in every borough in which the body corporate, or any one or more of the members of such body corporate in *his or their corporate capacity* then stood solely or together with any person or persons elected solely by such body corporate, or by any members thereof, *seised or possessed for any estate or interest whatsoever* of any hereditaments or personal estate whatsoever, in whole or in part, in trust for any charitable trusts, all the estate and interest, and all the powers of such body corporate or of such members thereof, should, from and after the 1st day of August, 1836, utterly cease; with a proviso that if Parliament should not otherwise direct, on or before the said 1st day of August, 1836 (*which was not done*), the Lord Chancellor should make such orders as he should see fit for the administration of such trust estates.

**Jurisdiction of the Court of Chancery under 5 & 6 W. 4, c. 76, s. 71.** — Under the authority “to make orders,” the Court of Chancery from time to time, for the due management of the charity property, appointed trustees in the place of the corporation. The jurisdiction of the Court, however, was held not to apply to a case where no *estate* was vested in the *old corporation*, but the charity property was vested in trustees, and the *corporation* was merely the visitor with powers of nomination (a). Where there was a charity corporation *substantially*, though not *identically*, the same in its compo-

[(c) *Re Adams' Trust*, 12 Ch. D. 634; a case under the Bankruptcy Act, 1869, of a compounding creditor; and see *Coombes v. Brookes*, 12 L. R. Eq. 61.]

(a) *Attorney-General v. Newbury Corporation*, C. P. Coop. Rep. 1837-38, 72; *Christ's Hospital v. Grainger*, 16 Sim. 102.

nent parts as the municipal corporation, the case was held to be within the spirit if not the letter of the section above referred to (*b*).

**Legal estate.**—The appointment of trustees by the Court under this Act, though it made them custodiers of the property, could not of course transfer to them the legal estate, which notwithstanding the strong negative words used in the statute, it was decided, remained in the corporation (*c*).

15. 16 & 17 Vict. c. 137, s. 65. — But by 16 & 17 Vict. c. 137, s. 65, the legal estate was vested without any actual conveyance in the trustees appointed by the Court, and upon the death, resignation or removal, of any of the trustees, and the appointment of any new trustee or trustees, the legal estate transferred itself to the trustees for the time being without any conveyance.

16. **Petitions for appointment of new trustees of charities.** — [It was held that] petitions for filling up vacancies in the number of trustees of charities, in substitution for a corporation, ought to be presented under Sir S. Romilly's Act (52 Geo. 3, c. 101), as well as the Municipal Corporations Act (*d*), and that the \*Attorney-General's [\*852] fiat should be obtained to such a petition (*a*); though this rule does not appear to have been uniformly adhered to (*b*).

[17. 45 & 46 Vict. c. 50, s. 133. — By the Municipal Corporations Act, 1882 (*c*), which repealed the previous Municipal Corporations Act, and 16 & 17 Vict. c. 137, s. 65, without prejudice to anything done under those Acts respectively, the provision for the transfer of the legal estate without conveyance on the appointment of new trustees is, by sect. 133, re-enacted. It is to be observed that the section does not continue the power to make orders for the administration of trust estates, but the appointment of trustees can still

(*b*) *Attorney-General v. Mayor, &c. of Exeter*, 2 De G. M. & G. 507.

(*c*) *Doe v. Norton*, 11 M. & W. 913.

(*d*) *Re Warwick Charities*, 1 Ph. 550.

(*a*) *Re Rolle's Charity*, 3 De G. M. & G. 153; *Re London, Brighton and*

*South Coast Railway Company*, 18 Beav. 608.

(*b*) *Re Nightingale's Charity*, 3 Hare, 336; *Re Belke's Charity*, 13 Jur. 317.

[(*c*) 45 & 46 Vict. c. 50.]

be made under Sir S. Romilly's Act, though it will seldom be necessary to resort to it for the purpose.]

18. **Appointment of trustees of charities under the Charitable Trusts Act.** — By the Charitable Trusts Act (16 & 17 Vict. c. 137, s. 28), new trustees of any charity the gross annual income whereof exceeds 30*l.* (*d*) may be appointed by one of the *equity judges in chambers*, and the Court has power at the same time to make an order under the Trustee Act, *without petition*, vesting the estates in the new trustees (*e*). But the sanction of the Charity Commissioners, under the 17th section, must first be obtained. And by a more recent Act still (23 & 24 Vict. c. 136, s. 2), the *Charity Commissioners* are empowered upon the application of the *trustees* or a *majority* of them, under their hands or common seal, to make the *like orders for the appointment of new trustees of charities as could have been made by a judge at chambers*; and this power extends even to contentious cases (*f*).

19. **Peto's Act.** — By 13 & 14 Vict. c. 28, "Wherever freehold, leasehold, copyhold, or customary property in England or Wales, has been or shall be acquired by any congregation, or society, or body of persons associated for *religious purposes* or for the promotion of *education*, as a chapel, meeting-house," &c., "and wherever the conveyance, assignment, or other assurance of such property has been or may be taken" to trustees duly appointed, such conveyance, assignment, or other assurance shall not only vest the property in [\*853] \*the parties named, but also in their successors from time to time, and where there is *no power to appoint new trustees*, the *society* may, for the purpose of vesting the estate, appoint new *trustees*; [but every] such appointment [whether under a power in the trust deed or by virtue of the Act] must be evidenced by deed under the hand and seal of

(*d*) By s. 32, where the income is below 30*l.* (since extended by 23 & 24 Vict. c. 136, s. 11, to an income not exceeding 50*l.*), the District Courts of Bankruptcy and County Courts have jurisdiction.

(*e*) *Re Davenport's Charity*, 4 De G. M. & G. 839. In *Lincoln Primitive*

*Methodist Chapel*, 1 Jur. N. S. 1011, V. C. Stuart does not appear to have had his attention drawn to the previous decision of Lord Cranworth in *Davenport's Charity*.

(*f*) *Re Burnham National Schools*, 17 L. R. Eq. 241.

the chairman and attested by two witnesses. The primary, if not the only object of this enactment obviously was to make the trust estate devolve upon the trustees of the society from time to time without conveyance, and it is doubtful whether the new trustees to be thus appointed by the society [in the absence of any special direction in the trust deed] succeed generally to all the powers of the old trustees, or take the legal estate only (*a*).

20. 13 & 14 Vict. c. 60. — Amongst the various provisions of the Trustee Act, 1850, (13 & 14 Vict. c. 60) it is enacted (by s. 32) that whenever it shall be *expedient* to appoint a new trustee or trustees, and it shall be found *inexpedient, difficult, or impracticable*, so to do without the assistance of the Court, the Court may *appoint a new trustee* or trustees, either in substitution for or in addition to any existing trustee or trustees (*b*). The effect of this section will be considered more particularly in the Appendix, in treating of the provisions of the Act generally.

**Trustee may be compelled to any act of duty.** — *Secondly*. The *cestui que trust* is entitled to bring an action against his trustee, and *compel him to the execution of any particular act of duty*.

1. **Maintenance of right at law.** — Thus, if the legal estate in the hands of the trustee be disturbed by a stranger, the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority (*c*), may oblige the trustee, on giving him a proper indemnity, to lend his name for asserting the legal right (*d*). If the trustee of a covenant, even a voluntary one, will not sue

(*a*) See as to the construction of the Act, *Re Houghton's Chapel*, 2 W. R. 631.

(*b*) Notwithstanding the very large terms of this enactment, it does not authorize the Court to remove a trustee who is willing to act: *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; *Re Blanchard*, 3 De G. F. & J. 131; 7 Jur. N. S. 505; *Re Mais*, 16 Jur. 608; *Re Garty's Set-*

*tlement*, 4 N. R. 636; [*Re Combs*, 51 L. T. N. S. 45.] See the Act with notes in the Appendix.

(*c*) See *Crossley v. Crowther*, 9 Hare, 386.

(*d*) *Foley v. Burnell*, 1 B. C. C. 277, *per* Lord Thurlow; Cary, 14; and see *Kirby v. Mash*, 3 Y & C. 295; *Malone v. Geraghty*, 2 Conn. & Laws. 251.

upon it, the *cestui que trust* may compel the trustee on a proper indemnity to lend his name to the *cestui que trust*, to enable him to sue (*e*). Otherwise, should the trust [\*854] property be lost, and the \*trustee himself become insolvent, the *cestui que trust's* equitable interest would be absolutely destroyed.

2. **Tenant for life of renewable leaseholds neglecting to renew.** — If a tenant for life of leaseholds be bound to renew, and by his threats or acts manifest an intention not to renew, the remainderman may institute proceedings and have a receiver appointed for the purpose of providing the renewal fine out of the rents and profits of the estate; and if the period of renewal has already expired, a receiver may be appointed on proof of the tenant for life's default (*a*).

3. **Trustee giving security.** — In one case, where a suspicion was entertained that the trustee would not fairly execute his trust, the Court required of him, if he continued in the office, to enter into securities for his good faith (*b*).

4. **Cestui que trust may have a contingent interest secured.** — And generally a *cestui que trust*, who can allege an existing interest, however minute or remote, may, upon reasonable cause shown, apply to the Court to have his interest properly secured.

5. **Possibility upon a possibility.** — But a distinction must be taken between an existing interest, whether vested or contingent, and the *mere possibility of a future event, which, if it occurs, may give birth to an interest*. Thus where a one-fifteenth share of a residue was bequeathed to Isaac for life, if he married Esther, and after his death for Isaac's eldest or only child living at his decease, and who should attain twenty-one, with a gift over in case Isaac should not marry Esther, and Isaac married Isabella while Esther was still living, it was held by M. R. (*c*), and affirmed by Lord Westbury (*d*), that the eldest child of Isaac, an infant, as his

(*e*) See *Fletcher v. Fletcher*, 4 Hare, 78; *Jerdein v. Bright*, 2 J. & H. 325.

(*a*) See *Bennett v. Colley*, 5 Sim. 192; S. C. 2 M. & K. 233.

(*b*) *Keeling v. Child*, Rep. t. Finch, 360.

(*c*) *Davis v. Angel*, 31 Beav. 223.

(*d*) 10 W. R. 723.

interest was preceded by the condition that Isaac should survive his present wife and then marry Esther, a possibility upon a possibility, could not sustain a suit for having his interest secured. Had Isaac survived his wife and then married Esther, the interest of the child would still have been contingent, and in that case M. R. appears to have thought that the child would have had no *locus standi* in Court, but L. C. was of a different opinion. And in another case, where a house was devised to trustees in trust for A. for life, and after his decease for the children of A. then living, and the issue of such of them as should be dead, and failing such children and issue in trust for a class, and some of the class presented a petition for the appointment of new trustees, on the footing that they were "persons beneficially interested" under the 37th section of the Trustee Act, 1850, M. R. dismissed the petition \*with [\*855] costs (a), but on appeal the order below was reversed, and the L. JJ. held that the petitioners were persons beneficially interested (b).

**Trustee may be restrained from violating his duty. — Thirdly.** As the *cestui que trust* may compel the trustee to the observance of his duty, so, on the other hand, if the *cestui que trust* have reason to suppose, and can satisfy the Court, that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may obtain an *injunction from the Court to restrain the trustee from such a wanton exercise of his legal power* (c).

1. **Though the damage would not be irreparable. —** It is clear the *cestui que trust* would be entitled to an injunction where the act in contemplation would, if done, be irremediable (d);

(a) *Re Sheppard's Trusts*, 10 W. R. 704.

(b) 1 N. R. 76; 4 De G. F. & J. 423.

(c) *Balls v. Strutt*, 1 Hare, 146. So a mortgagee with a power of sale will proceed at his peril to sell the mortgaged estate after tender of principal and interest, though costs be not included, if the security be sufficient; and a purchaser with notice cannot

shelter himself under a clause in the mortgage deed exempting the purchaser from the necessity of seeing to the validity of the sale; *Jenkins v. Jones*, 2 Giff. 99.

(d) See *Corporation of Ludlow v. Greenhouse*, 1 Bligh. N. S. 57; *Re Chertsey Market*, 6 Price, 279, 281; *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 42.

but in *Pechel v. Fowler* (*e*), a case in the Exchequer while a Court of equity, it is said to have been held, that a *cestui que trust* could not restrain an improvident *sale* by the trustee, because the *cestui que trust* might proceed against the trustee for the consequential damage to the trust estate, and so the injury was not irreparable; but Sir J. Leach, under similar circumstances, granted an injunction (*f*); and other authorities are not wanting in support of so just and reasonable a right, which may now be considered as established (*g*).

2. **Partial owner may obtain injunction.**—And not only a person exclusively interested in a trust fund, and therefore the absolute owner, may obtain an injunction against the disposition of it, which is almost matter of course; but one who has only a common interest with others, in the trust estate, is entitled on behalf of himself and those others to have the property secured (*h*).

3. **Injunction against bankrupt or insolvent trustee.**—An injunction against the disposition of the fund may be obtained against an insolvent trustee (*i*) and *à fortiori* [\*856] against one \* who is actually a bankrupt (*a*), but the Court will not interpose because an executor is merely poor (*b*); but the Court will grant an injunction against the administration of the assets by an executor who is proved to be of bad character, drunken habits, and great poverty (*c*), [and the Court will in a creditors' action appoint a receiver against an executor if there is any danger of his exercising his legal right to pay any creditor in full (*d*).

(*e*) 2 Anst. 549.

(*f*) Anon. case, 6 Mad. 10.

(*g*) See *Webb v. Earl of Shaftesbury*, 7 Ves. 487, 488; *Reeve v. Parkins*, 2 J. & W. 390; *Milligan v. Mitchell*, 1 M. & K. 446; *Attorney-General v. Mayor of Liverpool*, 1 M. & Cr. 210; *Vann v. Barnett*, 2 B. C. C. 157; *Dance v. Goldingham*, 8 L. R. Ch. App. 902.

(*h*) *Scott v. Becher*, 4 Price, 346; *Dance v. Goldingham*, 8 L. R. Ch. App. 902.

(*i*) *Mansfield v. Shaw*, 3 Mad. 100; *Scott v. Becher*, 4 Price, 346; *Taylor v. Allen*, 2 Atk. 213.

(*a*) *Gladdon v. Stoneman*, 1 Mad. 143, note.

(*b*) *Howard v. Papera*, 1 Mad. 143; *Hathornthwaite v. Russel*, 2 Atk. 126; *S. C. Barn*. 334.

(*c*) *Everett v. Prythergch*, 12 Sim. 365.

[(*d*) *Re Radcliffe*, 7 Ch. D. 733.]

4. **Solicitor buying up mortgages by his client.** — If a solicitor buy up mortgages created by his client in order to relieve the client from embarrassment, and afterwards refuses to give information as to the securities and threatens to sell the property, he will be restrained from selling upon the terms of the client paying into Court such a sum as the Court considers sufficient to cover the amount actually paid by the solicitor (*e*).]

[(*e*) *Macleod v. Jones*, 24 Ch. D. 289.]

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THE REMEDIES OF THE CESTUI QUE TRUST IN THE EVENT  
OF A BREACH OF TRUST.

UPON the subject of the *cestui que trust's* remedies for a breach of trust, we shall consider, *First*. The right of the *cestui que trust* to follow the *specific* estate into the hands of a stranger, to whom it has been tortiously conveyed; *Secondly*. The right of attaching the property into which the trust estate has been *wrongfully converted*; *Thirdly*. The remedy against the trustee *personally*, by way of compensation for the mischievous consequences of the act; and *Fourthly*. The *mode* and *extent* of redress in breaches of trust committed by trustees of charities.

SECTION I.

OF FOLLOWING THE ESTATE INTO THE HANDS OF A STRANGER.

The questions that suggest themselves upon this subject are, *First*. Into whose hands the estate may be followed; *Secondly*, Within what limits of time; *Thirdly*, What account the Court will direct of the mesne rents and profits.

*First. Into whose hands the estate may be followed.*<sup>1</sup>

1. **Where alienee is a volunteer estate may be followed.** — If the alienee be a *volunteer*, then (subject to any bar arising out of the Statute of Limitations) the estate may be fol-

<sup>1</sup> The *cestui que trust* may follow the trust property into the possession of a holder for value, if he had notice of it; *Jones v. Shaddock*, 41 Ala. 262; *McLeod v. Bank*, 42 Miss. 90; and into the hands of a volunteer, without notice; *Lyford v. Thurston*, 16 N. H. 399; *Barr v. Cabbage*, 52 Mo. 404; as to what is sufficient notice, see *Gunnell v. Cockerill*, 79 Ill. 79. The *cestui que trust* may follow property which is not transferable into the hands of a purchaser, and charge the property with all the equities attaching to it; *Gray v. Ulrich*, 8 Kan. 112; *Lathrop v. Bampton*, 31 Cal. 17; trustees not having any right to

lowed into his hands, whether he had notice of the trust (*a*), or not (*b*); for though he had no actual notice, yet the Court will imply it against \*him where he paid [\*858] no consideration. But if the alienee be a *purchaser* of the estate at its full value, then (subject as aforesaid) if he take with *notice* of the trust, whether the notice be actual or constructive (*a*), he is bound to the same extent and in the same manner as the person of whom he purchased (*b*), even though the conveyance was made to him by fine with non-claim (*c*); for, knowing another's right to the property,

(*a*) *Mansell v. Mansell*, 2 P. W. 678; and see *Saunders v. Dehew*, 2 Vern. 271; S. C. 2 Freem. 123; *Langton v. Astrey*, 2 Ch. Rep. 30; S. C. Nels. 126.

(*b*) *Mansell v. Mansell*, 2 P. W. 681, *per Cur.*; *Bell v. Bell*, Ll. & G. t. Plunket, 58, *per Cur.*; *Pye v. George*, 2 Salk. 680, *per Lord Harcourt*; and see 1 Rep. 122 b; *Burgess v. Wheate*, 1 Eden, 219; *Spurgeon v. Collier*, 1 Eden, 55; *Cole v. Moore*, Mo. 806.

(*a*) *Boursot v. Savage*, 2 L. R. Eq. 134. And see *Hartford v. Power*, 2 Ir. Rep. Eq. 204.

(*b*) *Dunbar v. Tredennick*, 2 B. & B. 319, *per Lord Manners*; *Pawlett v. Attorney-General*, Hard. 469, *per Lord Hale*; *Burgess v. Wheate*, 1 Eden, 195; *per Sir T. Clarke*; *Bovey v. Smith*, 1 Vern. 149; *Phayre v. Peree*, 3 Dow, 129; *Adair v. Shaw*, 1 Sch. & Lef.

262, *per Lord Redesdale*; *Wigg v. Wigg*, 1 Atk. 382; *Mead v. Lord Orrery*, 3 Atk. 238, *per Lord Hardwicke*; *Mackreth v. Symmons*, 15 Ves. 350, *per Lord Eldon*; *Mansell v. Mansell*, 2 P. W. 681, *per Cur.*; *Willoughby v. Willoughby*, 1 T. R. 771, *per Lord Hardwicke*; *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345; *Flemming v. Page*, Rep. t. Finch, 320; *Powell v. Price*, 2 P. W. 539, admitted; *Backhouse v. Middleton*, 1 Ch. Ca. 173; S. C. Id. 208; *Walley v. Walley*, 1 Vern. 484; *Pearce v. Newlyn*, 3 Mad. 186; *Slatery v. Axton*, W. N. 1866, p. 113; *Macbryde v. Eykyn*, W. N. 1867, p. 306; *Heath v. Crealock*, 18 L. R. Eq. 215, 10 L. R. Ch. App. 22.

(*c*) *Kennedy v. Daly*, 1 Sch. & Lef. 355; and see *Bell v. Bell*, Ll. & G. t. Plunket, 44.

go beyond the authority necessarily given them; *Vernon v. Board of Police*, 47 Miss. 181. The *cestui que trust* may follow the trust property so long as he can identify it or its equivalent; *Yerger v. Jones*, 16 How. 36; *Turner v. Petigrew*, 6 Humph. 438; *Bailey v. Inglee*, 2 Paige, 278; *Bomar v. Mullins*, 4 Rich. Eq. 80; *Bazemore v. Davis*, 55 Ga. 504; *Garrett v. Garrett*, 1 Strob. Eq. 96. Unless trust funds can be clearly traced and identified, the *cestui que trust* can have no claim upon them; *Pharis v. Leachman*, 20 Ala. 663; if a trustee sell the trust estate and purchase another, it will be presumed he did it with the trust funds; *Yerger v. Jones*, 16 How. 36; the rights of remainder men apply to the original estate only; *Noble v. Andrews*, 37 Conn. 346. The *cestui que trust* may elect between the trust fund and the land purchased with it; *Kaufman v. Crawford*, 9 W. & S. 134; *Murray v. Lylburn*, 2 Johns. Ch. 441; if the trustee has used the trust funds to pay his own debts, the *cestui que trust* can have no lien on the original claims of the creditors; *Winder v. Diffenderffer*, 2 Bland, 198.

he throws away his money voluntarily, and of his own free will (*d*). And the rule applies not only to the case of a trust, properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*e*), or a *lien* for purchase-money (*f*). But, if a *bonâ fide* purchaser have *not* notice, either expressly or constructively, he then merits the full protection of the Court, and his title, even in equity, cannot be impeached (*g*).

2. **Purchaser without notice cannot protect himself by getting in legal estate from an express trustee.** — If the purchaser have no notice of the trust at the time of the purchase, but afterwards *discovers the trust and obtains a conveyance from the trustee*, he cannot protect himself by taking shelter under the legal estate; for this is not like getting in a first mortgage, which the first mortgagee has a right to transfer to \*whomsoever he will (*a*); but here notice of the trust converts the purchaser into a trustee, and he must not, to get a plank to save himself, be guilty of a breach of trust (*b*). A purchaser taking the legal estate

(*d*) *Mead v. Lord Orrery*, 3 Atk. 238, *per* Lord Hardwicke.

(*e*) *Daniels v. Davison*, 16 Ves. 249; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32; *Ferrars v. Cherry*, 2 Vern. 384; *Jackson's case*, Lane, 60; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Kennedy v. Daly*, 1 Sch. & Lef. 355.

(*f*) *Mackreth v. Symmons*, 15 Ves. 329; *Walker v. Preswick*, 2 Ves. 622, *per* Lord Hardwicke; *Cator v. Pembroke*, 1 B. C. C. 302, *per* Lord Loughborough; *Gibbons v. Baddall*, 2 Eq. Ca. Ab. 682, note (*b*); *Elliot v. Edwards*, 3 B. & P. 181; and see *Grant v. Mills*, 2 V. & B. 306; *Dunbar v. Tredennick*, 2 B. & B. 320.

(*g*) *Burgess v. Wheate*, 1 Eden, 195, *per* Sir T. Clarke; *Id.* 246, *per* Lord Henley; *Millard's case*, 2 Freem. 43; *Mansell v. Mansell*, 2 P. W. 681, *per* Cur.; *Willoughby v. Willoughby*, 1 T. R. 771, *per* Lord Hardwicke;

*Dunbar v. Tredennick*, 2 B. & B. 318, *per* Lord Mannors; *Trevor v. Trevor*, 1 P. W. 633; *Harding v. Hardrett*, Rep. t. Finch, 9; *Cole v. Moore*, Mo. 806, *per* Cur.; *Jones v. Powles*, 3 M. & K. 581; *Payne v. Compton*, 2 Y. & C. 457; *Thorndike v. Hunt*, 3 De G. & J. 563; *Heath v. Crealock*, 18 L. R. Eq. 215, 10 L. R. Ch. App. 22; *Waldy v. Gray*, 20 L. R. Eq. 238.

(*a*) *Bates v. Johnson*, Johns. 304; *Baillie v. M'Kewan*, 35 Beav. 177; *Joyce v. Rawlins*, 11 L. R. Eq. 53; *Mumford v. Stohwasser*, 18 L. R. Eq. 556.

(*b*) *Saunders v. Delcaw*, 2 Vern. 271; S. C. 2 Freem. 123; *Langton v. Astrey*, 2 Ch. Rep. 30; S. C. Nels. 126; *Carter v. Carter*, 3 K. & J. 617; *Sharples v. Adams*, 32 Beav. 213; *Collier v. McBean*, 34 Beav. 426; *Justice v. Wynne*, 10 Ir. Ch. Rep. 489; 12 Ir. Ch. Rep. 289; *Prosser v. Rice*, 28 Beav. 68; *Heath v. Crealock*, 10 L. R. Ch. App. 22.

without actual notice of the trust, but taking it from a person in whom it vested by an instrument which disclosed the trust, but *of which instrument the purchaser was ignorant at the time of purchase*, can still protect himself as a purchaser without notice (*c*).

**Shares in a company.**—Where a trustee of shares of a company within the Companies' Clauses Consolidation Act transferred them to a *stranger without notice*, but who had notice before the transfer was *registered*, the purchaser was protected; for he had no notice when he paid his money, and it was like a conveyance where the legal estate was to become vested on the performance of some condition, such as making a demand or the like, and the registration involved no breach of trust by the trustee (*d*). A trustee who has the legal estate and takes from his *cestui que trust* an assignment of the equitable interest by way of security for money advanced to the *cestui que trust*, can avail himself of the legal estate as a protection against a prior incumbrance of which he had no notice.<sup>1</sup>

**3. Purchaser without notice from purchaser with notice.**—A purchaser *without notice from a purchaser with notice* is not liable, for his own *bona fides* is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it (*e*). But the rule does not apply to the case of a *charitable use*, for it has been ruled that a purchaser without notice from a purchaser with notice shall be bound by the claim of a charity (*f*). In other respects the principles of equity as to the doctrine of notice are applicable to charities in the same manner as between private persons (*g*).

(*c*) *Pilcher v. Rawlins*, 7 L. R. Ch. App. 259, overruling *Carter v. Carter*, 3 K. & J. 617.

(*d*) *Dodds v. Hills*, 2 H. & M. 424; [and see *France v. Clark*, 22 Ch. D. 830; 26 Ch. D. 257.]

(*e*) *Mertins v. Jolliffe*, Amb. 313, per Lord Hardwicke; *Ferrars v. Cherry*, 2 Vern. 384; see *Pitts v.*

*Edelph, Tothill*, 164; *Salsbury v. Bagott*, 2 Sw. 608.

(*f*) *East Greenstead's case*, Duke, 65; *Sutton Colefield case*, Id. 68; and see Id. 94, 173; see *Commissioners of Charitable Donations v. Wybrants*, 2 Jon. & Lat. 194.

(*g*) See *Sugd. Vend. & Pur.* 722, 14th edit.

<sup>1</sup> *Newman v. Newman*, 28 Ch. D. 674.

**4. Purchaser with notice from purchaser without notice. —**

A purchaser *with notice from a purchaser without notice* is exempt from the trust, not from the merits of the second purchaser, but of the first; for if an innocent purchaser were prevented from disposing of the beneficial interest, the necessary result would be a stagnation of property (*h*). But

if the trustee sell the lands to a *bonâ fide* purchaser [\*860] without notice, and afterwards *himself* become \*the

owner of the lands, though for a good and valuable consideration, the trust as to him revives again, and he shall restore the land to the trust (*a*); and in this respect equity follows the law; for, if a trespasser of goods sell them in the market overt, the owner's title is barred; but if they come to the trespasser again, the owner may seize them (*b*). ["The only exception to the rule which protects a purchaser with notice taking from a purchaser without notice is that which prevents a trustee buying back trust property which he has sold, or a fraudulent man who has acquired property by fraud saying he sold it to a *bonâ fide* purchaser without notice, and has got it back again" (*c*).]

**5. How far purchaser bound by notice of a doubtful equity.**

— Upon the question, how far a purchaser will be bound by notice of a *doubtful equity*, Lord Northington said, in *Cordwell v. Mackrill* (*d*), "A man must take notice of a deed on which an equity, supported by precedents the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends on their locality." And Sir W. Grant observed, "There may be such a *doubtful equity* that a purchaser is *not to be taken to know what will be the decision*, and

(*h*) *Harrison v. Forth*, Pr. Ch. 51; *Bradwell v. Catchpole*, stated Walker v. Symonds, 3 Sw. 78, note (*a*); *Mertins v. Joliffe*, Amb. 313, per Lord Hardwicke; *Brandlyn v. Ord*, 1 Atk. 571, per eundem; *Sweet v. Southcote*, 2 B. C. C. 66; *M'Queen v. Farquhar*, 11 Ves. 478, per Lord Eldon; *Lowther v. Carlton*, 2 Atk. 242; S. C. 3 Barn. 358; S. C. For. 187; *Andrew v. Wrigley*, 4 B. C. C. 136, per Cur.;

*Salsbury v. Bagott*, 2 Sw. 608, per Cur.; [*Re Barrow's case*, 14 Ch. D. 432.]

(*a*) *Bovy v. Smith*, 2 Ch. Ca. 124; S. C. 1 Vern. 60, 84, 144; *Kennedy v. Daly*, 1 Sch. & Lef. 379, per Lord Redesdale.

(*b*) See *Bovy v. Smith*, 2 Ch. Ca. 126.

[(*c*) Per Jessel, M. R. *Re Barrow's case*, 14 Ch. D. 445.]

(*d*) 2 Eden, 347; S. C. Amb. 516.

that is all Lord Camden (*e*) means; but in this case the equity is *clear*" (*f*).

6. **Notice of "heirs of the body."**—The rule, that "heirs of the body" in articles shall be construed "first and other sons," does not appear to have been fully established till about the year 1720 (*g*): Lord Hardwicke therefore said, that notice of *ancient* articles, that is, of articles before the doctrine was well settled, should not bind a *bond fide* purchaser (*h*). And afterwards, in a case of both articles and settlement before marriage, the settlement reciting the articles, Lord Hardwicke thought that, as the equity in this instance rested upon a single authority (*i*), and *that* one in which the question arose between the parties and their representatives and mere volunteers, the \*pur- [\*861] chaser ought not to be bound by the claim of the issue (*a*). But notice of *modern* articles, that is, of articles entered into since the clear establishment of the rule, will affect a purchaser (*b*); but, even then, the articles themselves must be produced, that the Court may judge from the whole instrument; for the true construction depends upon the words; and other parts of the deed may be material to find out their meaning (*c*).

**Lord St. Leonards' observations on Cordwell v. Mackrill.**—Lord St. Leonards observed, that Cordwell v. Mackrill was of no great authority, though decided by a great Judge; and conceived the true rule to be that, where upon the whole article it is plain what construction the Court would have put upon them, had it been called upon to execute them at the time they were made, they should be enforced *however difficult the construction might be*, even as against a purchaser with notice, but not after a lapse of time where there was

(*e*) Sir W. Grant appears to have supposed that the decision was by Lord Camden.

(*f*) Parker v. Brooke, 9 Ves. 588.

(*g*) By Trevor v. Trevor, 1 P. W. 622.

(*h*) Senhouse v. Earle, Amb. 288; and accordingly relief not asked against purchasers in West v. Errissey, 2 P. W. 349.

(*i*) West v. Errissey, 2 P. W. 349.

(*a*) Warrick v. Warrick, 3 Atk. 291.

(*b*) Senhouse v. Earle, Amb. 288, per Lord Hardwicke; Davies v. Davies, 4 Beav. 54; and see Parker v. Brooke, 9 Ves. 587.

(*c*) Cordwell v. Mackrill, Amb. 515; S. C. 2 Eden, 344.

anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated (*d*).

7. **Title long neglected.**—In a case where a residuary legatee had enjoyed for nineteen years a copyhold estate, which had been mortgaged to the testator in fee, and then the heir of the testator recovered the land by ejectment and mortgaged it, and the residuary legatee, having neglected to assert his title to the possession for nine years, at the end of that period filed a bill in Chancery and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee; for it was not that “*clear, broad, plain equity*” which should affect a purchaser (*e*).

8. **Separate use.**—A testator had given a leasehold estate to his daughter to her sole and separate use, but *without the interposition of a trustee* (*f*), and the husband, supposing himself absolutely entitled, entered into possession, and afterwards mortgaged the premises; and it was held that the mortgagee was bound to notice the equitable construction of the will, as a doctrine well understood (*g*); and, the husband having obtained a revisionary lease and mortgaged it, the mortgagee was of course held cognisant of the rule, that leases obtained under cover of the tenant right would be subject to the equity of the original term (*h*).

[\*862] \*9. **Choses en action.**—As regards *choses en action*, and other personal estate not transferable at law, which may have been purchased from a trustee, the purchaser, whatever amount may have been paid by him, cannot stand on a better footing than the person of whom he purchases, but must (in conformity with the established rule governing assignments of *choses en action*) hold them subject to the same equities to which the trustee held them (*a*).

(*d*) *Thompson v. Simpson*, 1 Dru. & War. 491.

(*e*) *Hardy v. Reeves*, 4 Ves. 406; S. C. 5 Ves. 426.

(*f*) See *supra*, p. 754.

(*g*) *Parker v. Brooke*, 9 Ves. 583.

(*h*) And see *Coppin v. Fernyhough*, 2 B. C. C. 291.

(*a*) *Ord v. White*, 3 Beav. 357; *Cockell v. Taylor*, 15 Beav. 103; *Clack v. Holland*, 19 Beav. 262; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Mangles v. Dixon*, 1 Mac. & G. 437, 3 H. L. Ca. 702; *Athenæum, &c. Society v. Pooley*, 3 De G. & J. 294.

10. **Equitable mortgage by trustee.**—So a trustee who has the legal estate cannot without a transfer of the legal estate create an equity, in breach of his duty: as if a trustee holding a mortgage were wrongfully to deposit the deeds by way of security, the depositee could not hold the deeds as against the *cestuis que trust*, for the transaction being inequitable in itself could not give birth to an equity (*b*).

[11. So, where trust money was improperly laid out in the purchase of an estate, which was conveyed to A. and mortgaged by him to several persons in succession without notice of the breach of trust, of whom the first only had the legal estate, it was held that the claim of the *cestuis que trust* against the property was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time (*c*). So, where a lease was surrendered by an executor, and a new lease including additional property was taken by him in his own name and at an increased rent, and was deposited by him as a security for an advance made to him, it was held that the *cestuis que trust* had priority over the equitable mortgagee (*d*).]

12. **Improper loans of trust money.**—And if a trustee in breach of his duty lend trust money, and the borrower, *with notice of the trust*, applies it to his own use, the conscience of the latter is affected, and he cannot separate the loan from the trust, and insist that, when the loan would as a loan have been barred, the trust is barred (*e*).

13. **General rule.**—And it may be laid down generally that the rules of the Court are the rules of honesty and fair dealing, and that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds (*f*).

(*b*) *Newton v. Newton*, 6 L. R. Eq. 135, 4 L. R. Ch. App. 143; see *Joyce v. De Moleyns*, 2 Jon. & Lat. 374.

[(*c*) *Cave v. Cave*, 15 Ch. D. 639; and see *Rice v. Rice*, 2 Drew. 73.]

[(*d*) *Re Morgan*, 18 Ch. D. 93.]

(*e*) *Ernest v. Croysdill*, 2 De G. F. & J. 198, *per* L. J. Turner.

(*f*) *Gray v. Lewis*, 8 L. R. Eq. 526; see p. 543.



[\*863] \*14. By 37 & 38 Vict. c. 78, s. 7, no priority or protection by reason of the legal estate was allowed even to a purchaser for value without notice; but any priority or protection so acquired before the commencement of the Act was not to be taken away; and the Act was not to apply to Scotland. But the 7th section of the Act has since been repealed by 38 & 39 Vict. c. 87, s. 129.

*Secondly. Within what limits of time the suit must be instituted.*<sup>1</sup>

1. **Time no bar in a direct trust, otherwise in a constructive trust.**—It is a well-known rule, that, as between *cestuis que*

<sup>1</sup> *Statute of Limitations.*—Time does not bar a direct trust, but if there has been extreme laches, equity might refuse to render any assistance; *Hallett v. Collins*, 10 How. 174; *Powell v. Murray*, 2 Edw. Ch. 644; *Anderson v. Burwell*, 6 Gratt. 405; *Chicago & East. Ill. R. R. Co. v. Hay*, 119 Ill. 493; *McCallam v. Carswell*, 75 Ga. 25; *University v. Bank*, 96 N. C. 280; *Churchman v. City of Indianapolis*, 110 Ind. 259; *Thompson v. Lyon*, 20 Mo. 155; 61 Am. Dec. 599; *Presley v. Davis*, 7 Rich. Eq. 105; 62 Am. Dec. 306; *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346; 58 Am. Dec. 296; *Gordon v. Small*, 53 Md. 550. Rights of *cestui que trust* under express trust, cannot be barred so long as the trust exists; *Pratt v. Thornton*, 28 Me. 355; *Commonwealth v. Moltz*, 10 Pa. St. 527; 51 Am. Dec. 499; *Railroad Co. v. Durant*, 95 U. S. 576; *Lewis v. Hawkins*, 23 Wall. 119; *Haynie v. Hall's Ex'r*, 5 Humph. 290; 42 Am. Dec. 427. If the statute runs against and bars the trustee, it will also bar the *cestui que trust*; *Clayton v. Cagle*, 97 N. C. 300; *Williams v. Otey*, 8 Humph. 563; 47 Am. Dec. 632; *Bryan v. Weems*, 29 Ala. 423. When the possession of the trustee becomes adverse to the *cestui que trust*, the statute will begin to run; *Edwards v. University*, 1 Dev. & Bat. Eq. 325; 30 Am. Dec. 170; *Speidel v. Henrici*, 120 U. S. 377; *Bacon v. Rives*, 106 U. S. 99; *Boone v. Chiles*, 10 Pet. 177; *Robinson v. Hook*, 4 Mason, 139; *Hill v. Bailey*, 8 Mo. App. 85; *Davis v. Coburn*, 128 Mass. 377; *Hubbell v. Medbury*, 53 N. Y. 98. "The trusts intended by courts of equity not to be reached by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court"; *Kane v. Bloodgood*, 7 Johns. Ch. 90; 11 Am. Dec. 417. Trustees' right of action may be barred, though the *cestui que trust* is an infant, and this also defeats the infant's rights; *Coleman v. Walker*, 3 Met. (Ky.) 65; 77 Am. Dec. 163; but see *Auding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658. Directors of corporations are not such trustees as are debarred from setting up the statute; *Baxter v. Moses*, 77 Me. 465; 52 Am. Rep. 783. Statute does not apply to lands held by city in trust for benefit of the public, where city holds under limited and defined trusts; *City of Alton v. Ill. Transp. Co.* 12 Ill. 38; 52 Am. Dec. 479; *Logan Co. v. Lincoln*, 81 Ill. 156. Implied trusts are barred by lapse of time; *Speidel v. Henrici*, 120 U. S. 377; they are not; *Astor v. L'Amoreux*, 4 Sandf. 524; constructive trusts and all save purely equitable or express trusts, are subject in equity to the statute of limitations; *Wood, Limitations*, 2258, 215; *Prevost v. Gratz*, 6 Wheat. 481;

*trust* and trustee in the case of a *direct trust*, no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there is no adverse title (*a*). It has hence been argued, that

(*a*) See *Chalmer v. Bradley*, 1 J. & W. 67; *Bennett v. Colley*, 2 M. & K. 232; *Llevellyn v. Mackworth*, Barn. 449; *Wilson v. Moore*, 1 M. & K. 146; *Townshend v. Townshend*, 1 B. C. C. 554; *Hamond v. Hicks*, 1 Vern. 432; *Norton v. Turvill*, 2 P. W. 144; *Bell v. Bell*, Ll. & G. t. Plunkett, 66; *Attorney-General v. Mayor of Exeter*, Jac. 448; *Heath v. Henly*, 1 Ch. Ca. 26; *Wedderburn v. Wedderburn*, 2 Keen, 749; 2 M. & Cr. 41; 22 Beav. 84; *Smith v. Acton*, 26 Beav. 210; *Lord Hollis's case*, 2 Vent. 345; *Earl of Pomfret v. Windsor*, 2 Ves. 484; *Hargreaves v. Michell*, 6 Mad. 326; *Nevarre v. Rutton*, 1 Vin. Ab. 185; *Shields v. Atkins*, 3 Atk. 563; *Phillipo v. Munnings*, 2 M. & Cr. 309; *Ward v. Arch*, 12 Sim. 472; *Young v. Waterpark*, 13 Sim. 204; *Gough v. Bult*, 16 Sim. 323; *Massy v. O'Dell*, 10 Ir. Ch. Rep. 22; *Crawford v. Crawford*, 1 Ir. Rep. Eq. 436; [*Foxton v. Manchester, &c. Banking Company*, 44 L. T. N. S. 406.] See *post*, p. 881.

*McClane v. Shepherd*, 21 N. J. Eq. 76; *Howell v. Howell*, 15 Wis. 55; *Davis v. Cotten*, 2 Jones, Eq. 430; one who is not actually a trustee, but upon whom that character is forced by a court of equity, only for the purpose of a remedy, may avail himself of the statute; *Peabody v. Flint*, 6 Allen, 52; *Baker v. Bank*, 9 Met. 182; *Carroll v. Green*, 92 U. S. 509; *Smith v. Poor*, 40 Me. 415. No exact time can be mentioned within which the laches will not be too great and relief will be given, but there have been a variety of decisions bearing upon it; *Norris's App.* 71 Pa. St. 124; *Powell v. Murray*, 10 Paige, 256; *Phillips v. Belden*, 2 Edw. Ch. 1; *Hayes v. Goode*, 7 Leigh, 486; *Paschall v. Hinderer*, 28 Ohio St. 568; *Maxwell v. Kennedy*, 8 How. 210; *Rhineland v. Barrow*, 17 Johns. 538; *Anderson v. Burwell*, 6 Gratt. 405; *Prevost v. Gratz*, 6 Wheat. 481. Yet it will be seen that although laches is a bar, the statute does not absolutely control in reference to time; *Juzan v. Toulmin*, 9 Ala. 662; *Pilcher v. Flinn*, 30 Ind. 202; *Ashhurst's App.* 60 Pa. St. 290; *Field v. Wilson*, 6 B. Mon. 479; *Phalen v. Clark*, 19 Conn. 421; *Henry Co. v. Winnebago, &c.* 52 Ill. 299. In general it may be said that if there is a bar at law, there is also a bar in equity; *Dodge v. Essex Ins. Co.*, 12 Gray, 71; *Phillips v. Rogers*, 12 Met. 405; *Humbert v. Trinity Church*, 24 Wend. 587; *Hayden v. Bucklin*, 9 Paige, 512; *Barnes v. Taylor*, 27 N. J. Eq. 265; *Reeves v. Dougherty*, 7 Yerg. 222. If both the trustee and *cestui que trust* are out of possession, the statute may run against both; *Crook v. Glenn*, 30 Md. 55; *Mason v. Mason*, 33 Ga. 435; *Fleming v. Gilmer*, 35 Ala. 62. As to a statute bar, see *Atty.-Gen. v. Meeting House*, 3 Gray, 1; *Merriam v. Hassam*, 14 Allen, 520; at any rate the statute will not begin to run while the *cestui que trust* is laboring under any disability or before his rights vest; *Price's App.* 54 Pa. St. 472. The statute has no effect where a fraud has been perpetrated; *Martin v. Smith*, 1 Dill. 95; *Pilcher v. Flinn*, 30 Ind. 202; until the fraud is known; *Currey v. Allen*, 34 Cal. 254; *Relf v. Eberly*, 23 Ia. 467. As between trustee and *cestui que trust* the statute is no bar in case of express trusts; *Kimball v. Ives*, 17 Vt. 430; *Norton v. Ladd*, 22 Conn. 203; *Creigh v. Henson*, 10 Gratt. 231; *Farnam v. Brooks*, 9

as the person into whose hands the estate is followed is also by construction of law a trustee, the *cestui que trust* is entitled to the benefit of the rule, and is not precluded by mere lapse of time from establishing his claim. But the authorities show that this doctrine cannot be maintained (b).

"It is certainly true," said Sir W. Grant, "that no time bars a *direct trust*; but if it is meant to be asserted that a Court of equity allows a man to make out a case of *constructive trust* at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, *where the true state of the fact is easily ascertained, and* [\*864] *where \* it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a Court of equity to seek that relief"* (a). And Lord Redesdale observed, "The position that *trust* and *fraud* are not within the statute must be thus qualified: that if a trustee is

(b) *Townshend v. Townshend*, 1 B. C. C. 550, see 554; *Bonney v. Ridgard*, 1 Cox, 145; *Andrew v. Wrigley*, 4 B. C. C. 125; *Collard v. Hare*, 2 R. & M. 675; and see *Cholmondeley v. Clinton*, 2 J. & W. 190; S.C. affirmed, 4 Bligh, 4; *Bell v. Bell*, Rep. t. Plunket, 66; *Portlock v. Gardner*, 1 Hare, 594; *Ex parte Hasell*, 3 Y. & C. 622;

*Wedderburn v. Wedderburn*, 4 M. & Cr. 53; but see *Attorney-General v. Christ's Hospital*, 3 M. & K. 344 (the case of a charity); *Rolfe v. Gregory*, 11 Jur. N. S. 98; 4 De G. J. & S. 576. *Sturgis v. Morse*, 3 De G. & J. 1.

(a) *Beckford v. Wade*, 17 Ves. 97.

*Pick*. 212; *Glass v. Gilbert*, 58 Pa. St. 266; *Gay v. Edwards*, 30 Miss. 218; *Weaver v. Leiman*, 52 Md. 710; *Manion v. Titsworth*, 18 B. Mon. 582. Statute running in favor of a purchaser without notice; *Merriam v. Hassam*, 14 Allen, 516; when it does not run against a resulting trust; *Dow v. Jewell*, 18 N. H. 340; when it does; *Brawner v. Staup*, 21 Md. 328; what determines lapse of time that will bar; *Dean v. Dean*, 9 N. J. Eq. 425; *Mumford v. Murray*, 6 Johns. Ch. 1; *Halsey v. Tate*, 52 Pa. St. 311.

*Presumption*. — Certain acts are presumed to have been done after a great lapse of time; *Bass v. Bass*, 8 Pick. 187; *Clemenston v. Williams*, 8 Cranch, 72; *Ashhurst's App.* 60 Pa. St. 290; *Hawkins v. Chapman*, 36 Md. 100; it is presumed that a trustee holds for the advantage and benefit of his *cestui que trust*; *Whiting v. Whiting*, 4 Gray, 237; *Colvin v. Menefee*, 11 Gratt. 92.

in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because *his possession is according to his title*. But the question of *fraud* is of a very different description; *that is a case where a person who is in possession by virtue of the fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a Court of equity, founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches a transaction on the ground of fraud*" (b).

2. **General operation of lapse of time.**—For more clearly understanding how lapse of time operates in reference to the remedy of the *cestui que trust* in the event of a wrongful alienation of the trust estate by the trustee, it may be useful to consider *the effect of lapse of time upon suits for equitable relief generally*.

**Three bars to equitable relief.**—To claims in equity there appear to be three bars arising from lapse of time:—I. *A statute of limitation*; II. *The presumption of something done which, if done, is subversive of the plaintiff's right*; III. *The ground of public policy or inconvenience of the relief*.

I. **Bar by analogy to a statute.**—Where there is a statutory bar at *law*, the same period was always either by analogy, or in obedience to the statute, adopted as a bar in *equity* in reference to equitable claims (c).

(1). **Lord Camden's views.**—The language of Lord Camden upon this subject has been admired as peculiarly energetic. "As a Court of equity," he said, "has no legislative authority, it cannot properly define the time of bar by a *positive*

(b) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633.

(c) See *Ex parte Dewdney*, 15 Ves. 496; *Bonney v. Ridgard*, 1 Cox, 149; *Beckford v. Wade*, 17 Ves. 97; *Townshend v. Townshend*, 1 B. C. C. 554; *Aggas v. Pickerell*, 3 Atk. 225; *Belch v. Harvey*, Appendix to Sugd. Vend. and Purch. No. xiv. 13th edit.; *White v. Ewer*, 2 Vent. 340; *Knowles v.*

*Spence*, 1 Eq. Ca. Ab. 315; *Pearson v. Pulley*, 1 Ch. Ca. 102; *Johnson v. Smith*, 2 Burr, 961; *Attorney-General v. Mayor of Exeter*, Jac. 448; *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Kingston v. Lorton*, 2 Hog. 166; *Foley v. Hill*, 1 Ph. 399; *Hamilton v. Grant*, 3 Dow, 44; *Marquis of Clanricarde v. Henning*, 30 Beav. 175.

rule to an hour, a minute, or a year: it is governed by circumstances. But as often as *Parliament* has limited [\*865] the time \*of actions and remedies to a certain period in legal proceedings, the Court of Chancery has adopted that rule, and applied it to similar cases in equity; for when the legislature has fixed a time at law, it would be preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law is confined to by Parliament; and therefore in all cases, where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar" (a).

**Lord Redesdale's views.** — Lord Redesdale, in a case before him, observed, "It is said that Courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that Courts of equity act merely by analogy to the statutes; they act in obedience to them" (b). And again, "I think the statute must be taken virtually to include Courts of equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed law; and therefore it must be taken to have virtually enacted in the same cases a limitation for Courts of equity also" (c). And the same doctrines have been repeatedly recognised by the highest authorities, amongst whom may be mentioned Lord Mannors (d), Sir T. Plumer (e), Lord Lyndhurst (f), and Lord Westbury (g).

(a) *Smith v. Clay*, cited in note to *Deloraine v. Browne*, 3 B. C. C. 639.

(b) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630.

(c) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 631; and see *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 192; *Bond v. Hopkins*, 1 Sch. & Lef. 429; [*Re Baker*, 20 Ch.

D. 230; *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.]

(d) *Medlicott v. O'Donel*, 1 B. & B. 166.

(e) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 151.

(f) *Foley v. Hill*, 1 Ph. 405.

(g) See *Knox v. Gye*, 5 L. R. H. L. 674.

(2). **Limitation of twenty years.** — Upon these principles, then, an *equitable* claim to *lands* could never have been enforced after a lapse of twenty years; for though to *writs of right* and to *formedons* much longer periods were allowed at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James, which fixed the limitation to the prosecution of *rights of entry* (*h*).

(3). **Bills to redeem.** — At law the remainderman's right always ran only from the \*determination of [\*866] the particular estate, but in the case of a *bill to redeem* filed by the person entitled in remainder to the equity of redemption, twenty years' possession by the mortgagee without account or admission of title, though partly or wholly during the lifetime of the tenant for life, barred the remainderman; the ground for the distinction apparently being, that the remainderman might have filed a bill to redeem during a continuance of the life estate (*a*). But where the mortgagee is also tenant for life of the equity of redemption, the time does not run against the remainderman until the death of the tenant for life (*b*); and the same rule applies where the mortgagee is tenant in common with others of the equity of redemption (*c*).

(4). **Fine.** — Where a fine, with proclamations, was levied by a person claiming adversely, though a volunteer, without actual notice or other imputation of fraud, a constructive trust was held to be barred after a lapse of *five* years (*d*).

(5). **Statutory bar not avoided by ignorance, poverty, &c.** — In the case of a *statutory bar* the limited period affords a substantial insuperable obstacle to the plaintiff's claim, and no plea of poverty, ignorance, or mistake, can be of any avail. However clear and indisputable the title, could the

(*h*) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 192.

(*a*) See *Giffard v. Hort*, 1 Sch. & Lef. 407, note; *Blake v. Foster*, 4 Bligh, N. S. 140; *Corbett v. Barker*, 1 Anstr. 138, 3 Anstr. 755; *Harrison v. Hollins*, 1 S. & S. 471; but see 2 Ph. 121.

(*b*) *Raffety v. King*, 1 Keen, 601, and cases there cited; *Burrell v. Lord Egremont*, 7 Beav. 205.

(*c*) *Wynne v. Styan*, 2 Ph. 303.

(*d*) *Bell v. Bell*, Ll. & G. t. Plunket, 44; and see 3 P. W. 310, note (G).

merits be enquired into, the limited time has elapsed, and the door of justice is closed (*e*). If the Court could relieve after twenty years on the ground of distress, or any similar plea, so might it after thirty, forty, or fifty; there would be no limitation, and property would be thrown into confusion (*f*).

(6). **Effect of forbearance of the trustee to sue.** — Sir Joseph Jekyll is reported on one occasion to have laid down the rule that, “the *forbearance* of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestuis que trust*” (*g*); and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust*; but this is not the case generally as regards the operation of the Statutes of Limitations. “The rule, that the Statute of Limitations does not bar a trust estate,” [\*867] said Lord Hardwicke, “holds only as between \**cestui que trust* and trustee, not as between *cestui que trust* and trustee on the one side, and strangers on the other, for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both” (*a*). “A *cestui que trust*,” said Lord Redesdale, “is always barred by length of time operating against the trustee. If the trustee does not enter, and the *cestui que trust* does not compel him to enter, as to the person claiming paramount the *cestui que trust* is barred” (*b*). And Lord Manners observed, “The opinion of Sir J. Jekyll, if intended to apply to *third persons*, which I do not conceive it was, has often been denied, and is contrary to many

(*e*) *Marquis of Cholmondeley v. Lord Clinton*, 2 J. & W. 139, *per* Sir T. Plumer; *Byrne v. Frere*, 2 Moll. 171, 178, *per* Sir A. Hart; *Astley v. Earl of Essex*, 18 L. R. Eq. 290. But as to mistake, see *Brooksbank v. Smith*, 2 Y. & C. 58.

(*f*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 640.

(*g*) *Lechmere v. Earl of Carlisle*, 3 P. W. 215.

(*a*) *Lewellin v. Mackworth*, 2 Eq. Ca. Ab. 579; *S. C. Barn.* 445.

(*b*) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.

decisions. If trustees neglect their duty, and suffer an adverse possession of twenty years to be held, I apprehend the Statute of Limitations is a bar to the *cestui que trust*" (c).

(7). **Case where cestui que trust is under disability, or is entitled in remainder.** — It results from the foregoing statements of the doctrine of the Court, that, as a general rule, where both *cestui que trust* and trustee are out of possession for the time prescribed by the Statutes of Limitations, the former suffers for the neglect of the latter and is barred. But the question still remains, whether in cases where the *cestui que trust* would, if his title were legal, have more than the ordinary time to sue (as where he is under *disability* or *entitled in remainder* only), he will be allowed the same extended period for suing in *equity*, notwithstanding that the *trustee* may be barred.

(8). **Where subject matter of trust is a debt.** — Where the subject matter of the trust is a debt, arising under a *covenant* or *contract*, it seems difficult to avoid the conclusion, that when the trustee is barred, the *cestui que trust* is barred also (d). But if the debtor borrowed the money as trust money, or knowing it to be such, he cannot set up the statute (e).

(9). **Where subject matter is land and possession is adverse.** — The same result would seem to follow where the subject matter of the trust is *land*, and the possession has been held adversely to both trustee and *cestui que trust*, without any species of privity, as when the trustee is disseised. Here there is generally no remedy in equity. The proper course for the *cestui que trust* \* is to bring [\*868] ejectment in the name of the trustee. The rare instance of a person entering without privity or authority upon lands belonging in equity to an infant may perhaps constitute an exception, the rule being that he who so enters must, whether the infant is legally or equitably entitled, be

(c) *Pentland v. Stokes*, 2 B. & B. 75.

(d) See *Wych v. East India Company*, 3 P. W. 309; *Stone v. Stone*, 5 L. R. Ch. App. 74; *Hammond v. Messenger*, 9 Sim. 327; *Bolton v. Powell*, 14 Beav. 275.

(e) *Spickernell v. Hotham, Kay*, 669; *Bridgman v. Gill*, 24 Beav. 302; *Ernest v. Croysdill*, 2 De G. F. & J. 175; 6 Jur. N. S. 740; and see *Stone v. Stone*, 5 L. R. Ch. App. 74.



regarded as a bailiff or receiver for the infant (*a*). But no such exception can be maintained where the infant has *never* been in possession by himself, his guardian, or agent, but the title was adverse to those through whom he claims (*b*). And even the existence of the exception itself cannot be viewed as free from doubt (*c*).

(10). **Where trust is of land and party in possession claims by conveyance from trustees.**—Where the subject matter of the trust is *land*, and the person in possession claims by *conveyance* from the trustee, here, unless the facts warrant the defence of *purchase for value without notice*, the right of the *cestui que trust* to fix the person in possession with the liability to perform the trust falls under an ordinary head of equitable jurisdiction. The *cestui que trust* is clearly entitled to proceed in equity against the legal owner, and the only question is within what time he must do so. In these cases, it is conceived, the *cestui que trust* (although the trustee may be barred from his action of ejectment) must, in the absence of any express statutory enactment applicable to the case (*d*), be entitled to sue in equity within the same extended period in reference to disability and accruer of right, as if his title were legal (*e*).

(11). **Fraud.**—No time will cover a *fraud so long as it remains concealed*; for, until discovery (or at all events until the fraud might with reasonable diligence have been discovered), the title to avoid the transaction does not [\*869] properly arise (*f*). But, *after discovery*, the \*defendant may avail himself of the statute, for he has

(*a*) See cases cited p. 886, *infra*, note (*e*).

(*b*) *Crowther v. Crowther*, 23 Beav. 305. But see *Quinton v. Frith*, 2 I. R. Eq. 414.

(*c*) See *Allen v. Sayer*, 2 Vern. 368, corrected from R. L. Treat. on Trusts, 3d edit. App. X., and the author's remarks at p. 720 of the same edition; *Wych v. East India Company*, 3 P. W. 309; *The Earl v. Countess of Huntingdon*, cited Ib. 310, note (G); *Thomas v. Thomas*, 2 K. & J. 79.

(*d*) See p. 876, *infra*.

(*e*) See *Scott v. Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*f*) *Blair v. Bromley*, 2 Ph. 354; *Rolfe v. Gregory*, 11 Jur. N. S. 97; S. C. 4 De G. J. & S. 576; *Cotterell v. Purchase*, Cas. t. Talbot, 63, *per* Lord Talbot; *Medlicott v. O'Donel*, 1 B. & B. 106, *per* Lord Manners; *Arran v. Tyrawly*, cited Ib. 170; *Alden v. Gregory*, 2 Eden, 280; *Morse v. Royal*, 12 Ves. 374, *per* Lord Erskine; *Bicknell v. Gough*, 3 Atk. 558; *South Sea Company v. Wymondsell*, 3 P. W. 143; *Booth v. Warrington*, 4 B. P. C. 163;

a right to say, "You shall not bring this matter under discussion at this distance of time; it is entirely your own neglect that you did not do so within the period limited by the statute" (a).

(12). **How defendant may take advantage of the statute.** — [The defendant may avail himself of the Statute of Limitations, by *pleading it himself* (b); but, if he neglect to do so,] he cannot shelter himself under the statute at the time of the hearing (c); though it seems the Court itself may still, in its own discretion, refuse to grant relief after the limited period (d).

(13). **In cases of fraud.** — Even when the plaintiff charges *fraud*, the defendant may plead [the statute] (e). If the plaintiff allege that he only discovered the fraud within the period limited by the statute, the defendant must either deny the fraud, or insist that the plaintiff had knowledge of it (f).

**II. Bar from presumption.** — The Court, after great length of time, will *presume* some act to have been done, which, if done, is a bar to the demand (g).

*Pickering v. Lord Stamford*, 2 Ves. jun. 280, *per* Lord Alvanley; *Hoven-den v. Lord Annesley*, 2 Sch. & Lef. 634; *Roche v. O'Brien*, 1 B. & B. 330; *Blennerhassett v. Day*, 2 B. & B. 118, *per* Lord Mannors; *Robertson v. Norris*, 1 Giff. 421; *Whatton v. Toone*, 5 Mad. 54; [*Metropolitan Bank v. Heiron*, 5 Ex. D. 319; *Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59;] and see *Whalley v. Whalley*, 1 Mer. 436; *Western v. Cartwright*, Sel. Cas. Ch. 34; *Re Agriculturists' Cattle Insurance Company*, 3 L. R. Eq. 769; [*Barber v. Houston*, 14 L. R. Ir. 273.] But Sir A. Hart thought time would run against fraud from the date of it, though undiscovered, provided the person entitled had knowledge of the fraud a reasonable time before the expiration of the period; *Byrne v. Frere*, 2 Moll. 157.

(a) *Hoven-den v. Lord Annesley*, 2 Sch. & Lef. 634, *per* Lord Redesdale;

*Western v. Cartwright*, Sel. Ch. Ca. 34; [*Metropolitan Bank v. Heiron*, 5 Ex. D. 319;] and see *Mulcahy v. Kennedy*, 1 Ridg. 337.

(b) Rules of the Supreme Court, 1883, Ord. 19, R. 15. As to the right under the old practice to raise the question by demurrer see the 7th Edition, p. 739, and cases there cited; and as to the present practice in lieu of demurrer see Ord. 25.]

(c) *Prince v. Heylin*, 1 Atk. 494; *Harrison v. Borwell*, 10 Sim. 382; *Roch v. Callen*, 6 Hare, 535; *Sleight v. Lawson*, 3 K. & J. 296.

(d) *Prince v. Heylin*, *ubi supra*.

(e) *South Sea Company v. Wymondsell*, 3 P. W. 143. [*Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.]

(f) See Mitford on Pleading, 269, 4th edit. [*Gibbs v. Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59.]

(g) *Pattison v. Hawkesworth*, 10

(1). **At what time presumption is raised.**—The period at which the Court raises the *presumption* depends upon the circumstances of the case. As a general rule, the Court presumes, after a lapse of twenty years (1), but where there is a statutable bar at *law*, and of a different period, the Court will not entertain a *presumption* within a *less time* than the period fixed by the statute (*h*).

(2). **Ground of the presumption.**—Presumptions [\*870] are made, not necessarily because the Court \*really believes what is presumed, but in the absence of evidence, for the purpose of quieting the possession (*a*): Lord Erskine observed, “It is said you cannot *presume* unless you *believe*. It is because there are no means of creating belief or disbelief, that such general presumptions are raised” (*b*). Where *positive* evidence can be presented to the Court, the fact may be presumed after a period much shorter than the usual one. And, on the other hand, though the distance of time may be far greater than the ordinary limit of presumption, yet if there appear any positive evidence to negative the fact, the legal inference cannot be sustained, for the rule is *stabit præsumptio donec probetur in contrarium*. But the Court has judged it better for the ends of justice, that presumptions should be *favoured* in law, and should not be rebutted by slight evidence in contradiction (*c*).

(3). **Ignorance, mistake and distress.**—The Court cannot *presume* a person to have abandoned his right so long as he remains in *ignorance* of it, or labours under a *mistake* (*d*);

Beav. 375; and see Attorney-General v. Moor, 20 Beav. 119; [but see Thomson v. Eastwood, 2 App. Cas. 215, 256].

(*h*) Eldridge v. Knott, Cowp. 214.

(*a*) Eldridge v. Knott, Cowp. 215, per Lord Mansfield; and see Grenfell v. Girdlestone, 2 Y. & C. 682; Magdalen College v. Attorney-General, 3 Jur. N. S. 675.

(*b*) Hillary v. Waller, 12 Ves. 266.

(*c*) Jones v. Turberville, 2 Ves. jun. 13, per Lord Commissioner Eyre;

and see Grenfell v. Girdlestone, 2 Y. & C. 682.

(*d*) See Marquis Cholmondeley v. Lord Clinton, 2 Mer. 362; Randall v. Errington, 10 Ves. 427; Roche v. O'Brien, 1 B. & B. 330, see 342; Pickering v. Stamford, 2 Ves. jun. 280, and following pages; S. C. Ib. 585; Chalmer v. Bradley, 1 J. & W. 65, and following pages; Bennet v. Colley, 2 M. & K. 232; Stone v. Godfrey, 5 De G. M. & G. 76.

(1) In Harwood v. Oglander, 6 Ves. 199, 8 Ves. 106, the bill was filed after a lapse of *thirty-two years*, yet neither Lord Alvanley nor Lord Eldon con-

and the *distress* of a person, so far as it accounts for his *laches* will *pro tanto* weaken the foundation of the presumption (e). So a release of right cannot with the same force be presumed against a *class of persons*, as against an individual; for it is not likely that a person having only an aliquot share in the property, should pursue his remedy with the same spirit, as if he were the exclusive proprietor (f).

III. Bar from public or private inconvenience. — Though the plaintiff's demand cannot be met by an *absolute bar*, and no release of right can be *presumed*; yet, thirdly, relief will not be granted where, if administered, *it would lead to great public or private inconvenience* (g).

(1). In action for account a settlement may be presumed. — Thus in an action for an account against an executor or administrator, who is in equity a *trustee*, and was formerly not \*protected by any statute of limita- [\*871] tions (a), though the *presumption* of a final settlement may be rebutted by positive evidence, the Court will not open the account at any distance of time, when it is probable that most of the parties are dead, and the vouchers and receipts are lost (b).

(2). Instances of great delay. — Where a suit was prosecuted after a delay of threescore and two years, Lord Keeper Wright said, that “the cause being now within one year of the grand climacteric, it was fit it should be at rest” (c). But bills have been dismissed at the end of

(e) See *Roche v. O'Brien*, 1 B. & B. 342; *Hillary v. Waller*, 12 Ves. 266; *Gowland v. De Faria*, 17 Ves. 25; *Byrne v. Frere*, 2 Moll. 171, 178.

(f) See *Whichcote v. Lawrence*, 3 Ves. 752; *Anon. case*, cited *Lister v. Lister*, 6 Ves. 632; *Kidney v. Coussmaker*, 12 Ves. 158; *Hardwick v. Mynd*, 1 Anst. 109; *Attorney-General v. Lord Dudley*, G. Coop. 146; [*Boswell v. Coaks*, 27 Ch. D. 425, 457;] but see *Elliott v. Merriman*, 2

Atk. 42; *Hercy v. Dinwoody*, 2 Ves. jun. 87.

(g) See *Attorney-General v. Mayor of Exeter*, Jac. 448.

(a) See now 3 & 4 W. 4, c. 27, s. 40; 23 & 24 Vict. c. 38, s. 13.

(b) *Hunton v. Davies*, 2 Ch. Rep. 44; *Huet v. Fletcher*, 1 Atk. 467; *Pearson v. Belchier*, 4 Ves. 627; *Hercy v. Dinwoody*, 2 Ves. jun. 87.

(c) *St. John v. Turner*, 2 Vern. 418.

sidered the length of time to bar the plaintiff's demand; but in this case the parties were *equitable tenants in common*, and as between them the presumption of *ouster* did not arise.

twenty-seven years (*d*), and a much shorter period would be a sufficient bar, should the Court see a difficulty in granting the relief: every case must be determined with reference to its own particular circumstances (*e*).

(3). In *Pickering v. Lord Stamford* (*f*) a testator gave the residue of his personal estate to a charity, and *thirty-five years* after his decease, the next of kin filed their bill for an account, and prayed that such part as consisted of money upon mortgage or other real securities, might be declared a void bequest, and distributable, subject to debts, &c., among the testator's next of kin. Lord Alvanley said: "*I know no rule that has established that mere length of time will bar.* Therefore, that being the case, I am to say whether under the circumstances a bar can be *presumed*" (*g*). And for facilitating the question of presumption, his Lordship directed certain previous enquiries by the Master; and it appearing from the report, that no release or assignment of their interest by the next of kin for the purposes of the charity could, under the circumstances, be presumed, his Lordship then had recourse to the ground of *Inconvenience*. The question, he observed, in all these cases is, whether there are motives of public policy or private inconvenience, to induce the Court to say, the suit ought not to be entertained. "If," said his Lordship, "from the plaintiff's lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, he must suffer; or the Court will oppose, what I think the best ground, *Public convenience*. The plaintiffs are so conscious of this, that they do not call on the trustees to account for what has been disbursed before any de-  
[\*872] mand \*made. It appears that the trustees, who by their conduct have done themselves great credit, have kept such accounts that there is no difficulty in finding the personal estate at the death of the testator. Therefore, desiring to be understood by no means to give any counte-

(*d*) *Campbell v. Graham*, 1 R. & M. 453. jun. 93; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 483.

(*e*) See *Hercy v. Dinwoody*, 2 Ves.

(*f*) 2 Ves. jun. 272.

(*g*) 2 Ves. jun. 283.

nance to these stale demands, but upon the circumstances that there is nothing inducing great public or private inconvenience, that the accounts are found, and that the trustees are not called on to account for what has been disbursed, I am bound to decide in favour of the plaintiffs" (a).

(4). **Bar from length of time.** — The doctrine laid down by Lord Alvanley in the case referred to, that *mere length of time* will not bar, requires some qualification. Lapse of time or delay in suing, unaccounted for by disability or other circumstances, constitutes *per se* in the eye of a Court of equity, *laches* disentitling the plaintiff, in *certain classes of cases* at least, to relief from the Court. Thus where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than twenty years may bar his title to relief (b). So where a plaintiff seeks to set aside a purchase from him by his solicitor (c), or of a reversionary interest (d), or to affix a defendant with a constructive trust (e), or to call a person to account for acts of waste (f), or comes to a Court of equity alleging a case of fraud as a ground for avoiding the operation of the Statute of Limitations (g). So where an account was sought by a surviving partner against the estate of a deceased partner, the Court, even assuming such case to fall within the exception as to merchants' accounts in the Statute of Limitations, refused its aid after a delay of thirteen years (h). And where the assistance of the Court is sought in a suit for specific performance (i), or in one partaking of that character (j), the rule

(a) 2 Ves. jun. 582, and following pages.

(b) See the cases, p. 495, *supra*.

(c) See *Gresley v. Mousley*, 4 De G. & J. 78; and the cases there cited; and *Lyddon v. Moss*. Ib. 104.

(d) *Roberts v. Tunstall*, 4 Hare, 257.

(e) *Clegg v. Edmondson*, 8 De G. M. & G. 787; 3 Jur. N. S. 299; *Isald v. Fitzgerald*, cited Amb. 735, 737; and see *Pennell v. Home*, 3 Drew. 337; *Norris v. Le Neve*, 3 Atk. 38; *Jackson v. Welsh*, Ll. & G. Rep. t. Plunk. 346.

(f) *Harcourt v. White*, 28 Beav. 303.

(g) *Blair v. Ormond*, 1 De G. & Sm. 428.

(h) *Tatam v. Williams*, 3 Hare, 347; and see *Harcourt v. White*, 28 Beav. 303.

(i) *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *Alloway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 160.

(j) *Hope v. Corporation of Gloucester*, 1 Jur. N. S. 320.

is extremely strict. It is difficult to refer the refusal of the relief by the Court, in the instances mentioned, to any one general principle. In the cases of purchases by trustees, or of claims founded upon constructive trust, the probability of alteration of \* circumstances in regard to the property, and the unfairness of the plaintiff in lying by, have weighed with the Court. Perhaps, the nearest approach to general principle will be found under the head of "Public Convenience"; "*Expedit Republicæ ut sit finis litium*" (a).

(5). **Bar from laches, where there is a Statute of Limitations.**—It has been pointed out that in *certain special cases* a delay of less than twenty years operates as a bar; and the Court in these instances departs still further from the analogy offered by the Statute of Limitations, by taking into account partly time which may have elapsed while the plaintiff's interest was reversionary (b). The question remains whether, *in general*, laches can be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one of the Statutes of Limitations; and it seems that, the legislature itself having prescribed a term of limitation which it deems sufficiently short, the Court ought not further to abridge that term (c).

(6). **Acquiescence.**—Besides the bars which have been enumerated arising from the effect of time, a plaintiff may also be precluded from relief on the ground of *acquiescence*. This is of two kinds:—*First*, direct, where the Act complained of was done with a full knowledge and express approbation of another, in which case a Court of equity will not allow that other to seek relief against the very transac-

(a) See *Gresley v. Mousley*, 4 De G & J. 95; *Carey v. Cuthbert*, 7 I. R. Eq. 542; 9 I. R. Eq. 330; *Payne v. Evens*, 18 L. R. Eq. 356.

(b) *Roberts v. Tunstall*, 4 Hare, 266; *Browne v. Cross*, 14 Beav. 105; but as to the latter case see observations of Turner, L. J. in *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 73.

(c) See *Rochdale Canal Company v. King*, 2 Sim. N. S. 89; *Penny v. Allen*, 7 De G. M. & G. 426; *Mehrtens v. Andrews*, 3 Beav. 76; *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117; *Clarke v. Hart*, 6 H. L. C. 633; *Beaudry v. Mayor, &c. of Montreal*, 11 Moore, P. C. C. 339; *Story v. Gape*, 2 Jur. N. S. 706; [*Re Baker*, 20 Ch. D. 230.]

tion to which he was himself a party (*d*). *Secondly*, indirect, where a person, having a right to set aside a transaction, stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection; when also a Court of equity will not relieve (*e*). But in the latter case, the Court not only looks to the conduct of the person who stands by, but also considers how

\*far the person in possession of the property has [\*874] any just claims to the protection of the Court.

Where, for instance, the possessor lays out his money, with a full knowledge that the property which he improves belongs to another, then it is said he makes the outlay to his own cost. "If," observed L. J. Turner, "a man places his property on the land of another with full knowledge of that person's title, how can the fact that the landowner assented to its being placed there give an equity to have it restored? If it did, the doctrine would come to this, that whenever a man lays out money on another person's land with the consent of the owner, he has an equity to have it repaid" (*a*).

[Where, however, the act complained of has been completed without any knowledge or assent on the part of the person seeking relief, there can be no acquiescence in the strict sense of the word, which has been "defined as quiescence under such circumstances as that assent may be reasonably inferred from it," and is no more than an instance of the law of estoppel by words or conduct. When once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, a right of action has vested in him, which at all events as a general rule cannot be divested without accord and satisfaction or release under

(*d*) See *Kent v. Jackson*, 14 Beav. 384; *Styles v. Guy*, 1 Mac. & G. 427; 1 Hall & Tw. 523; *Ex parte Morgan*, 1 Hall & Tw. 328; *Graham v. Birkenhead, &c. Railway Company*, 2 Mac. & G. 146.

(*e*) *Duke of Leeds v. Amherst*, 2 Ph. 123; *Phillipson v. Gatty*, 7 Hare, 523; *Stafford v. Stafford*, 1 De G. & J. 202; [*Simpson v. Simpson*, 3 L. R. Ir. 308;] and see *Jorden v. Money*, 5 H.

L. C. 185. [It must however be borne in mind that where there is a legal right to set aside a transaction, as for instance a fraudulent conveyance under 13 Eliz. c. 5, mere delay to enforce it, unless the delay is such as to cause a statutory bar, is no defence; *Re Maddever*, 27 Ch. D. 523.]

(*a*) *Rennie v. Young*, 2 De G. & J. 136, see 142. See *ante*, p. 716.



seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances (*b*).]

**Late Limitation Acts.** — We may now introduce the late Acts for the limitation of actions and suits.

3. The 3 & 4 Will. 4, c. 27, enacts as follows:—

**Lands and rents.** — Sect. 24: “No person claiming any *land* or *rent* in *equity* shall bring any suit to recover the same, but within the period, during which by virtue of the provisions hereinbefore contained (*c*), he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at *law* to such estate, interest, or right in or to the same as he shall claim therein in equity” (*d*).

**Express trusts.** — Sect. 25: “When any land or [\*875] rent shall be vested in a trustee \* upon *any express trust*, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or *any person claiming through him* (*a*), to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act *at, and not before*, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him” (*b*).

**Fraud.** — Sect. 26: “In every case of a *concealed fraud* the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom

[(*b*) *Per* L. J. Thesiger in delivering the judgment of the Court of Appeal, *De Bussche v. Alt*, 8 Ch. D. 286, 314; and see *post*, p. 922.]

(*c*) See 37 & 38 Vict. c. 57, s. 9, which from the commencement of the Act (1st January, 1879), varies the periods within which actions and suits may be brought.

(*d*) See *Scott v. Scott*, 18 Jur. 755; 4 H. L. Cas. 1065.

(*a*) As to the meaning of these words, see *Burroughs v. McCreight*, 1 Jon. & Lat. 304.

(*b*) Sums of money and legacies charged on land and secured by an *express trust*, are as from 1st January, 1879, made only recoverable within the time allowed for recovery, had there been no *express trust*; 37 & 38 Vict. c. 57, s. 10.

he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered" (c).

**Acquiescence.** — Sect. 27: "Nothing in the Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of the Act."

**Arrears of rent or interest.** — Sect. 42: "No *arrears* of *rent* or of *interest* in respect of any sum of money *charged upon*, or payable out of, any land or rent, shall be recovered by any action or suit, but within *six years* next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same is payable or his agent."

4. 37 & 38 Vict. c. 57. — And the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), enacts, that *from and after 1st January, 1879*:—

Sect. 1. No action or suit shall be brought to recover any land or rent but within *twelve* years from the time when the right first accrued.

Sect. 2. The right, as to *reversions, remainders, and future estates* shall be deemed to first accrue when they fall into possession. But if the person entitled to the particular estate on which the future estate was expectant shall not have been in possession when his interest determined, the action or suit must be brought within twelve years from the time the first right accrued to the owner of the particular estate, or within six years from the time when the estate of the person becoming entitled in possession became vested in possession whichever of those two periods shall be the longer.

Sect. 3. In cases of disability, *six* years from the cesser of the disability or from the death of the person under disability shall be allowed, notwithstanding the expiration of the twelve years.

(c) See *Manby v. Bewicke*, 3 K. 371; *Vane v. Vane*, 8 L. R. Ch. App. & J. 342; *Petre v. Petre*, 1 Drew. 383.

Sect. 4. No extension of time shall be allowed for *absence beyond seas*.

[\*876] \*Sect. 5. No action or suit to recover any land shall be brought but within *thirty* years from the time when the right first accrued, notwithstanding the existence of any *disability* or succession of disabilities.

5. **Result of the Acts.** — It results from these Acts that since 1st January, 1879, *twelve* years' possession is made a statutory bar to suits in *equity* in respect of *equitable* interests, as in the case of actions at law upon *legal rights* (a), but in case of *disability* a term of *six* years is allowed next after the cesser of the disability, subject to the proviso that no suit is to be brought after the lapse of thirty years from the accruer of the right, whatever disabilities may have existed.

6. **In case of express trust time runs from conveyance for value only.** — The effect of the 25th section of 3 & 4 Will. 4, c. 27, is that, as between the trustee and any person claiming through him, and the *cestui que trust* and any person claiming through him, time does not run until there has been a conveyance to a purchaser for valuable consideration. The trust estate may, therefore, be followed by the *cestui que trust*, notwithstanding acquiescence by him (b), not only as against the trustee, but as against all volunteers claiming under him (c); but so soon as the estate is conveyed to a purchaser for valuable consideration (as if it be made the subject of a marriage settlement), the time begins to run (d); and a lease for value is *pro tanto* a conveyance within the meaning of the Act (e). No possession, however, by a pur-

[(a) The existence of a trust term, the trusts of which never actively arise, and under which possession is never taken, cannot be set up by the person entitled subject to the term as an answer to a defence founded upon the statute; *Twaddle v. Murphy*, 8 L. R. Ir. 123.]

(b) *Browne v. Radford*, W. N. 1874, p. 124.

(c) *Sturgis v. Morse*, 24 Beav. 541, 3 De G. & J. 1; *Heenan v. Berry*, 2 Jon. & Lat. 303; *Salter v. Cavanagh*,

1 Dru. & Walsh, 668; *Blair v. Nugent*, 3 Jon. & Lat. 658, 9 Ir. Eq. Rep. 400; *Ravenscroft v. Frisby*, 2 Coll. 16; *Massy v. O'Dell*, 10 Ir. Ch. Rep. 22; *O'Reilly v. Walsh*, 6 I. R. Eq. 555; and see *Dixon v. Gayfere*, 17 Beav. 421; *Mutlow v. Bigg*, 18 L. R. Eq. 246.

(d) *Petre v. Petre*, 1 Drew. 371.

(e) *Attorney-General v. Davey*, 4 De G. & J. 136; *Attorney-General v. Payne*, 27 Beav. 168.

chaser for valuable consideration short of the statutory period will be a bar (*f*).

7. **And not even then as against persons under disability, &c.** — The question whether a lapse of the statutory period from the time of a conveyance for value by a trustee will bar *cestuis que trust*, who, by reason of *disability* or their rights being *reversionary*, would otherwise be entitled to sue after such period, is not free from difficulty. The 25th section of 3 & 4 W. 4, c. 27, enacts affirmatively that the right is to be deemed to have accrued *at* the time of conveyance, and this, in strict construction, would seem to work an independent bar. But this section is merely a proviso on \* the 24th section, which is in effect an enactment [\*877] *restraining* the right to sue in *equity* within the limits allowed for suits at *law*; and the 25th section would appear to be not a further *restraint* of the right to sue, but an *enlargement*, by way of *modification* of the restriction previously introduced by the 24th section. The decisions and *dicta* accord with this view and point to the conclusion that a *cestui que trust*, who is a remainderman, or under disability, is entitled to the full statutory period from the accruer of the right in possession, or from the cesser of the disability, as the case may be, notwithstanding the trustee may have conveyed away the estate for value, and the twenty or twelve years, as the case may be, may have elapsed from the date of conveyance, but in no case must the period allowed now exceed thirty years, from the accruer of the right in possession (*a*).

8. **Express trusts.** — The 25th section applies only to *express trusts*; it is therefore necessary to ascertain with precision what is meant by this phrase. Trusts, *as regards the provisions of the statute*, may be considered as divided into express trusts and constructive trusts; the former arising

(*f*) Attorney-General v. Flint, 4 Hare, 147. But see Carey v. Cuthbert, 7 I. R. Eq. 542; 9 I. R. Eq. 330.

(*a*) Thompson v. Simpson, 1 Dru. & War. 489; Attorney-General v. Magdalen College, 18 Beav. 239, 250;

6 H. L. Cas. 189, see p. 215; Life Association of Scotland v. Siddal, 3 De G. F. & J. 58; Shaw v. Keighron, 3 I. R. Eq. 574; and see Butler v. Carter, 5 L. R. Eq. 276; Quinton v. Frith, 2 I. R. Eq. 396.

upon the language of some written instrument, and the latter such as are elicited by the principles of a Court of equity from the acts of parties.

**9. Word "trust" not necessary to constitute an express trust.**

— It is not necessary to use the word *trust* in order to create an express trust within the meaning of the statute (*b*), but any language that would in equity raise or imply a trust will be deemed an express trust. If, therefore, land be devised to a person upon trust to receive the rents and thereout to pay certain annuities, the surplus rents result to the heir-at-law upon the face of the instrument, and this being an express trust, the heir-at-law is not barred by any length of possession by the trustee (*c*).

**10. Constructive trusts not saved.** — But trusts arising by the construction of a Court of equity [\*878] from the *acts of parties*, or to be made out by *circumstances*, or to be proved by *evidence*, will not be saved by the clause relating to express trusts, as if the devisee for life of a leasehold estate renew in his own name, the statute will begin to run from the time of the renewal (*a*). So if a trust fund be lent to A., and thereupon B. as surety with notice of the trust gives a mortgage of his estate to secure the fund, here B. is not an express trustee; and if no interest be paid for the statutable period, the *cestui que trust* is barred (*b*). [So where the first mortgagee of a ship sold the ship under the power conferred by the Merchant Shipping Act (17 & 18 Vict. c. 104), it was held that he was not an express trustee

(*b*) *Commissioners of Charitable Donations v. Wybrants*, 2 Jon. & Lat. 197.

(*c*) *Salter v. Cavanagh*, 1 Dru. & Walsh, 608; and see *Commissioners of Charitable Donations v. Wybrants*, 2 Jon. & Lat. 196; 7 Ir. Eq. Rep. 580; *Mutlow v. Bigg*, 18 L. R. Eq. 246, [reversed on other grounds, 1 Ch. D. 385.] In *Lord St. John v. Boughton*, 9 Sim. 223, where there was an express trust to sell and pay debts, the late V. C. E. thought that as no part of the produce of the sale had been set apart for debts, the case

was not within the exception of the 25th section, but fell under the 40th section, and that if there had been no subsequent acknowledgment of the debt, it could not have been recovered. This, it is conceived, cannot be maintained. However, it was a dictum only, as the bonds were directed to be paid on the ground of acknowledgment; see *Watson v. Saul*, 1 Giff. 197.

(*a*) *Petre v. Petre*, 1 Drew. 371; *Re Scott*, 8 Ir. Ch. Rep. 316; In the matter of *P. Dane*, 5 I. R. Eq. 498.

(*b*) *Re Scott*, 8 Ir. Ch. Rep. 316.

of the surplus proceeds of sale for the subsequent mortgagee (c).] But if there be an express trustee, and another person with full knowledge of the trust and in collusion with the trustee, and therefore by active fraud, appropriates the property to his own use, he stands in the place of the trustee, and while the fraud remains concealed the statute does not run (d). If a person act as the trustee of a settlement containing express trusts, though he assume the character by mistake, he will be deemed, so far as he acts, an express trustee (e).

11. **Charges.** — Mere *charges* might have been held to fall under the description of express trusts, but that they are dealt with under a separate section, viz., the 40th of 3 & 4 W. 4, c. 27 (for which as from 1st January, 1879, is now substituted the 8th section of 37 & 38 Vict. c. 57), a circumstance which shows that they were meant to be distinguished from express trusts. If, therefore, a testator, having two properties, A. and B., *charged* all his real estate with his *debts*, and devised estate A. to trustees upon *trust* to pay his debts, the statute as to estate B. [was] made a bar under 3 & 4 Will. 4, c. 27, after twenty years, (and under 37 & 38 Vict. c. 57, [is a bar] after twelve years), but as to estate A. it [did] not [before 1st January, 1879] begin to run until a conveyance to a purchaser, for valuable consideration (f); [but by the 10th section of 37 & 38 Vict. c. 57, the time for recovering any money payable out of land is made the same, whether it is secured by an express trust or not.] So, if an estate be devised to A., *charged* with 1000*l.* in favour of \* B., or “A. *paying* 1000*l.* to B.,” [or “on the con- [\*879] dition of A. well and truly paying £1000 to B.” (a),] although a suit may be sustained in equity to have the sum raised on the footing of a trust, yet it is not an express trust within the meaning of the statute, and [will, therefore, independently of sect. 10 of 37 & 38 Vict. c. 57,] be now barred

[(c) *Banner v. Berridge*, 18 Ch. D. 254.]

(d) *Rolfe v. Gregory*, 4 De. G. J. & S. 576.

(e) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 58; and see

*Smith v. Smith*, 10 I. R. Eq. 273; 1 L. R. Ir. 206.

(f) *Jacquet v. Jacquet*, 27 Beav. 332; *Proud v. Proud*, 32 Beav. 235.

[(a) *Cunningham v. Foot*, 3 App Cas. 974.]

at the end of twelve years (*b*). And if a testator charge his debts and direct his executors to raise them by mortgage or otherwise, the direction adds nothing to the charge (which *per se* authorised the raising of the debts by mortgage or otherwise), and no express trust, but only a charge, is created (*c*).

12. **Charge coupled with a duty.**— But a charge in form may be an express trust in fact. Thus where an estate in Ireland was devised to trustees and their heirs, upon trust to convey to J. W. for life charged with annuities to certain corporations for charitable purposes, although the corporations were interposed as trustees, yet, as the devisees were bound to execute a settlement, so as to secure the annuities and retain the legal estate in the meantime, they were, until the settlement had been executed, trustees for the charity (*d*). So, though a simple charge of the testator's debts fell within the 40th section of 3 & 4 W. 4, c. 27, and the creditor was barred after twenty years (*e*), yet, if the will was so worded as to impose on the devisees subject to the charge the *personal obligation* of exerting themselves actively in paying the debts, it became an express trust and fell within the exception of the 25th section (*f*).

13. **Charge and express trust in same matter.**— A charge upon an estate may under the same instrument be a mere charge as between some parties, while it is an express trust within the 25th section as between other parties. If, for instance, an estate be devised to A. and his heirs, subject to a charge of 500*l.* to B. and C. upon certain trusts, this, as between A. and the two trustees, is a mere charge, and would

(*b*) *Knox v. Kelly*, 6 Ir. Eq. Rep. 279; *Toft v. Stephenson*, 7 Hare, 1; *Hodge v. Churchward*, 16 Sim. 71; *Francis v. Grover*, 5 Hare, 39; *Hughes v. Kelly*, 3 Dru. & War. 482; [*Cunningham v. Foot*, 3 App. Cas. 974;] and see *Harrison v. Duignan*, 2 Dru. & War. 206.

(*c*) *Dickinson v. Teasdale*, 31 Beav. 511; 1 De G. J. & Sm. 52.

(*d*) Commissioners of Charitable

*Donations v. Wybrants*, 2 Jon. & Lat. 182, 7 Ir. Eq. Rep. 580.

(*e*) *Dundas v. Blake*, 12 Ir. Eq. Rep. 138, and cases there cited. The 40th section, as from 1st January, 1879, has been repealed by 37 & 38 Vict. c. 57, s. 9. See the 8th section of the latter Act.

(*f*) *Hunt v. Bateman*, 10 Ir. Eq. Rep. 360, and cases there cited; *Watson v. Saul*, 1 Giff. 188; and see *Burrows v. Gore*, 6 H. L. Cas. 907.

be barred after twenty or twelve years, as the case may be, but, as between the two trustees and their *cestuis que trust*, the charge when raised will be an express \* trust, [\*880] and the time of the bar as between them will be extended accordingly.

14. **Case of charge secured by a term of years.**—If a *term of years* be limited to trustees for the purpose of securing the charge, the rights of the *cestui que trust* will not be barred so long as the term vested in their trustees remains unbarred (a).

15. **Mortgage by way of trust.**—A *mortgage by way of trust for sale* is nothing more than a mortgage with a power of sale, and does not come under the description of an express trust within the meaning of the 25th section (b). [A mortgagee, after his mortgage debt has been fully paid, is not an express trustee of the mortgaged property until reconveyance (c).]

16. **Charge must be presently raisable.**—To make the Act operate as a bar to a charge there must be a *hand to receive*, and capable of signing a receipt; as if 400*l.* be *charged by* deed on an estate, and by the same deed it is assigned to trustees upon trust for A. and B. for their lives, and after the death of the survivor for their children, but no power of signing receipts is given to the trustees, and, on the contrary, the Court collects the intention that the trustees are not to raise the money till after the death of the surviving tenant for life, the statute does not begin to run until the latter period (d).

17. **Persons claiming through the trustee.**—It will be observed that, by the 25th section of 3 & 4 Will. 4, c. 27, the *cestui que trust* and any person claiming through him may

(a) *Young v. Lord Waterpark*, 13 Sim. 202; on appeal, 15 L. J. N. S. Ch. 63; *Cox v. Dolman*, 2 De G. M. & G. 592; and see *Ward v. Arch*, 12 Sim. 472.

(b) *Locking v. Parker*, 8 L. R. Ch. App. 30; [*Re Alison*, 11 Ch. D. 284.]

[(c) *Sands to Thompson*, 22 Ch. D. 614.]

(d) *M'Carthy v. Daunt*, 11 Ir. Eq. Rep. 29. Assuming that the trustees could not sign a receipt, the decision was right; but it was a bold step to say that the trustees had not such a power. And see *Attorney-General v. Persse*, 2 Dru. & War. 67; *Carroll v. Hargrave*, 5 I. R. Eq. 123; and see *post*, p. 886.



enforce the trust against the trustee and *any person claiming through him (e)*, but *both trustee and cestui que trust* may be ousted by the intrusion of a third title, and if so, the statute will begin to run from the dispossession of the trustee and *cestui que trust*. Thus, in 1810, a legal estate was vested in trustees upon trust for five tenants in common, but from 1819 to the filing of the bill in 1842, four of the tenants in common received the rents to the *exclusion of their co-tenant and of the trustees*, who never executed their duty; and it was held that there had been an ouster of both *trustees and cestui que trust*, and that the right of such *cestui que trust* was barred by the statute (*f*).

[\*881] \*18. **Possession by one of the cestuis que trust.**—

A *cestui que trust* in *actual possession* is *tenant at will* to his trustee (*a*), and the 7th section of the Act enacts that “when any person shall be in possession as *tenant at will*, the right of the person entitled subject thereto to make an entry shall be deemed to have first accrued at the determination of such tenancy, or *at the expiration of one year from the commencement of such tenancy*. Provided that no *cestui que trust* shall be deemed to be a tenant at will within the meaning of the clause to his trustee.” The exception was introduced in relief of the trustee that he might not be obliged to take active steps lest the tenancy at will should be deemed to have expired, and so the statute should begin to run. In other words, the tenancy should not be determined at the end of one year (*b*). The statute, therefore, does not run against the trustee so long as the *cestui que trust* is in actual possession. [A mortgagor, where the mortgage debt has been fully paid but no reconveyance has been made, is a tenant at will of the mortgagee, but is not a *cestui que trust* of the mortgagee within the meaning of the proviso, and time therefore runs against the mortgagee, and

(e) See cases, p. 876, note (c), *supra*.

(f) *Burroughs v. McCreight*, 1 Jon. & Lat. 290, 7 Ir. Eq. Rep. 49; [Bolling v. Hobday, 31 W. R. 9;] and see *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 198; *Re*

Birmingham, 4 I. R. Eq. 187; *Knight v. Bowyer*, 2 De G. & J. 440.

(a) See *ante*, Chap. xxvi. s. 1.

(b) See the observations of Wilde, C. J., in *Garrard v. Tuck*, 13 Jur. 873.

after more than thirteen years his legal estate will be extinguished (c).]

And it has been laid down, that if the *cestui que trust* be let into possession as *tenant at will* to the trustee, the tenancy is not determined by the *cestui que trust* sub-letting to an under-tenant, unless the trustee had notice of such underletting, for, though the general rule is that a tenancy at will is not *assignable*, yet the rule is subject to the qualification that a tenant at will cannot determine his tenancy by transferring his interest to a third party without notice to his landlord (d).

But if the *cestui que trust* be not the *actual occupier*, but only in receipt of the *rents and profits*, he is not tenant at will to the trustee, but the possession remains with the trustee, and the *cestui que trust* is the trustee's bailiff or agent for the management of the estate, and therefore if the *cestui que trust* allow any tenant of the trust estate to hold for twelve years, without paying rent or other acknowledgment of title, the statute runs against the trustee through the default of his bailiff or agent (e). The trustee, \*therefore, who puts a *cestui que trust* in receipt of the [\*882] rents and profits has still a duty to perform, and may be held responsible for a loss accruing through neglect in not looking after his bailiff or agent.

19. **Cestui que trust in possession by mistake.**— If *actual possession* be held by the trustee of an express trust who has the *legal estate*, but who mistakes his *cestui que trust* and pays the rents to a wrong person, the possession of the trustee is the possession of the rightful *cestui que trust*, and the wrongful recipient of the rents does not acquire a title by adverse possession under the statute (a); and this principle is of very extensive application, for, as we have seen, where a *cestui que trust* is put into receipt of the rents and

[ (c) *Sands to Thompson*, 22 Ch. D. 614.]

(d) *Melling v. Leak*, 1 Jur. N. S. 760, per Cresswell, J. The *alienee* cannot be deemed tenant at will of the trustees without some acknowl-

edgment by them; Doe *d. Stanway v. Rock*, 4 Man. & G. 30.

(e) *Melling v. Leak*, 16 C. B. 652; 1 Jur. N. S. 759.

(a) *Lister v. Pickford*, 34 Beav. 576.

*profits*, the *possession* is still that of the trustee, and the *cestui que trust* is regarded in the light of the bailiff or agent of the trustee. But it is always a question for the jury, or the Court sitting as a jury, to say whether the *cestui que trust* was in receipt of the rents as *bailiff* or *agent* of the trustee, or was in receipt of the rents as claiming the beneficial ownership independently of the trustee. In the former case, the statute of limitations would not run, but in the latter case it would (b).

20. **Disseisin by cestui que trust.** — If *cestui que trust* under a will hold adverse possession of an estate supposed to pass, but which did not in fact pass by the will to a trustee and eventually the true owner is barred, the legal estate gained by the *disseisin* vests in the trustee of the will, under colour of which the possession was taken, and not in the *cestui que trust* (c).

21. **42d section.** — The 42d section of the Act, limiting the recovery of arrears of rent or interest to the last six years only, has no application to cases of express trusts within the 25th section, but the *cestui que trust* could, prior to the 1st of January, 1879, have recovered from his trustees the whole arrearages from the commencement of the title (d).

22. **[Subsisting term.]** — And where there was a subsisting term not barred, upon which the trustee might obtain *possession*, the whole arrearages [could, prior to the 1st of January, 1879, have been] recovered (e).

(b) As in *Burroughs v. M'Creight*, 1 Jon. & Lat. 290, where the statute was effectually pleaded "not by persons who had placed themselves in the shoes of the trustees, but by persons who, in spite of the trustees, had received the rents for upwards of twenty years for their own benefit," *Ib.* 305; and see *Cholmondeley v. Clinton*, *ante*, p. 723; *Parker v. Carter*, *ante*, p. 734.

(c) *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89; *Hawksbee v. Hawksbee*, 11 Hare, 230; and see *Paine v. Jones*, 18 L. R. Eq. 320.

(d) *Playfair v. Cooper*, 17 Beav.

187; *Gough v. Bult*, 16 Sim. 323; *Watson v. Saul*, 1 Giff. 200; *Sturgis v. Morse*, 3 De G. & J. 1, 24 Beav. 541; *Gyles v. Gyles*, 9 Ir. Ch. Rep. 135. And see *Wright v. Chard*, 4 Drew. 680.

(e) *Cox v. Dolman*, 2 De G. M. & G. 592; *Snow v. Booth*, 2 K. & J. 132; 8 De G. M. & G. 69; *Lewis v. Duncombe* (No. 2), 29 Beav. 175; *Lawton v. Ford*, 2 L. R. Eq. 97; *Earl of Mansfield v. Ogle*, 1 Jur. N. S. 414; *Re Wyse*, 4 Ir. Ch. Rep. 297; *Re Birmingham*, 4 Ir. Rep. Eq. 187, 9 I. R. Eq. 385; *Re Murphy*, 5 Ir. Rep. Eq. 147.

\* Thus, in *Cox v. Dolman* (a), a testator devised [\*883] his lands to the use of trustees for ninety-nine years upon trust to pay certain annuities, and subject thereto to the use of S. Cox for life, with remainder over; and after the death of S. Cox, one of the annuitants filed a bill to have the arrears of the annuity raised out of the estate. The executors of S. Cox pleaded the statute as a bar to more than six years' arrears, but the Court held that it was the case of an express trust, and that the tenant for life had taken possession subject to the trust, and that the term was a subsisting one, upon which the trustees might at any time have recovered, and the plaintiff was declared entitled to the whole arrears, which were to be paid out of the assets of the tenant for life up to the day of his death, and since his death by the remainderman. The direct remedy was, no doubt, to have the whole arrears raised by sale or mortgage of the term, but as the remainderman would be entitled to recover the arrears that accrued in the lifetime of the tenant for life from his estate, the Court, to avoid circuity, decreed payment at once out of the tenant for life's assets.

[23. 37 & 38 Vict. c. 57, s. 10. — But under 37 & 38 Vict. c. 57, s. 10, as from the 1st of January, 1879, no action, suit or other proceeding may be brought to recover any arrears of rent or of interest in respect of any sum of money or legacy charged upon or payable out of any land or rent, and secured by an *express trust*, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust (b). Thus where an annuity which was secured by an express trust had been unpaid for twenty-five years, and no claim of any sort was made in respect of the annuity during that period, it was held that no *arrears* of the annuity, accrued before a claim for the annuity was made, could be recovered from the property charged; for the remedy for the arrears was the same as if there had been no express trust, in which case they would have been irrecoverable; but the section did not affect the right to future payments of the annuity (c). It may be

(a) 2 De G. M. & G. 592.

(b) See *post*, p. 885.

[(c) *Hughes v. Coles*, 27 Ch. D.

231.]

doubted whether this was correctly decided, for the annuity itself was admittedly still subsisting; and by the 42d section of 3 & 4 W. 4, c. 27, six years' arrears of such an annuity are recoverable without any express trust; and the 10th section of the Act of 1874, contemplates the existence [\*884] of some period \* during which the arrears could have been recovered. The intention of the section seems to have been to limit the period during which the arrears are to be recoverable, and not to destroy the right to recover any arrears, and it hardly seems to justify the argument that as, in the absence of an express trust, the annuity itself would have been barred by the statute, and therefore no arrears of the annuity could in that case have been recoverable, no arrears are recoverable though the annuity is still subsisting.]

24. **Charities.** — It was at first doubted whether charities were not altogether unaffected by the Act of 3 and 4 W. 4, c. 27, inasmuch as, by a special exception in their favour, Courts of equity did not oppose to charitable, as they did to ordinary equitable claims, a bar by analogy to the old Statutes of Limitation, and the Act of W. 4, contained no express mention of charities (a); but it was afterwards held that they were within the operation of the 24th section, though they might be protected by the 25th section relating to express trusts (b); and the law was ultimately so settled in the case of *Attorney-General v. Magdalen College* (c) on appeal to the House of Lords.

25. **Legacy.** — A *legacy* cannot be recovered under 37 & 38 Vict. c. 57, after twelve years. But if the executor assent to the legacy, he then becomes a trustee, and the statute does not run (d); and *a fortiori* if the legacy be coupled with a trust as for the separate use of a *feme covert*, the executor, after assent to the trust, is converted into a trustee (e); and

(a) *Incorporated Society v. Richards*, 1 Dru. & War. 287, 288.

(b) *Commissioners of Charitable Donations v. Wybrants*, 2 Jon. & Lat. 182, 7 Ir. Eq. Rep. 580.

(c) 18 Beav. 223; 6 H. L. Cas. 189; *Attorney-General v. Davey*, 19 Beav. 521, 4 De G. & J. 136; At-

*torney-General v. Payne*, 27 Beav. 168.

(d) *Phillipo v. Munnings*, 2 M. & Cr. 309; *O'Reilly v. Walsh*, 6 Ir. Eq. 555.

(e) *Hartford v. Power*, 2 Ir. Rep. Eq. 204.

if a legacy be given to A. for life with remainder to his children, and the circumstances are such that during the life of A. there is no hand entitled to receive it, the time does not run against the children during the life of A. (*f*).

**26. Residue or share of residue.**—The 8th section of 37 & 38 Vict. c. 57, is, as from 1st January, 1879, substituted for the 40th section of 3 & 4 W. 4, c. 27, and it is presumed that under the substituted as under the original section the limited period will by a liberal construction of the word *legacy* be held to be a bar to suits also in respect of a *residue* or share of residue (*g*).

\* 27. **23 & 24 Vict. c. 38, s. 13.**—The 40th section [\*885] of 3 & 4 W. 4, c. 27, did not extend to the case of *intestacy*, and by 23 & 24 Vict. c. 38, s. 13, no suit or other proceeding can be brought to recover personal estate or any share thereof from the personal representative of any *intestate* but within twenty years after the accruer of the right, unless there has been part payment or some acknowledgment in writing. The 8th section of 37 and 38 Vict. c. 57, appears not to extend to the case of an *intestacy*, and if so, a legatee will under the latter section be barred after twelve years, while the *next of kin* will not be barred until after twenty years (*a*).

**28. Assets subsequently received.**—The right of the legatee or next of kin may be barred as to assets received more than the prescribed period before the commencement of the suit, but not barred as to assets received since (*b*).

**29. 36 & 37 Vict. c. 66, s. 25.**—By 36 & 37 Vict. c. 66, s. 25, subs. 2, it is enacted that “no claim of a *cestui que trust* against his *trustee* (*c*) for any property held on an *express*

(*f*) *Carroll v. Hargrave*, 5 I. R. Eq. 123; see *ante*, p. 880, note (*d*).

(*g*) *Prior v. Horniblow*, 2 Y. & C. 201; *Christian v. Devereux*, 12 Sim. 264; [*Sutton v. Sutton*, 22 Ch. D. 511, 517;] and see *Payne v. Evens*, 18 L. R. Eq. 356; *Carey v. Cuthbert*, 7 I. R. Eq. 542.

[(*a*) See *Sutton v. Sutton*, 22 Ch. D. 511, 517.]

(*b*) See *Adams v. Barry*, 2 Coll. 290.

[(*c*) In *Seagram v. Tuck*, 18 Ch. D. 296, Kay, J. was of opinion that a receiver appointed by the Court was a trustee of money received by him so as not to be able to avail himself of the Statute of Limitations.]

trust, or in respect of any *breach of such trust*, shall be held to be barred by any statute of limitations."

**37 & 38 Vict. c. 57, s. 10.** — The 37 and 38 Vict. c. 57, s. 10, enacts that from 1st January, 1879, no money or legacy charged on any land or rent shall, though *secured by an express trust*, be *recoverable*, except within the time within which it might have been recovered had there been no express trust.

The former of these two Acts applies as between *trustee* and *cestui que trust*, while the latter applies as between the *land charged* (though *secured by way of trust*) and the persons entitled to the charge (*d*).

**Account of mesne rents and profits.** — *Thirdly.* We have to enquire to *what extent a Court of equity upon recovery of the estate, will direct an account against the defendant of the mesne rents and profits.*<sup>1</sup>

[(*d*) *Fearnside v. Flint*, 22 Ch. D. 579; *Hughes v. Coles*, 27 Ch. D. 231.]

<sup>1</sup> Trustees cannot receive any personal gain nor advantage from the trust, other than what they may be fairly entitled to as compensation for services, it being their duty to give the *cestuis que trust* all the profits, benefits and income arising from the estate; *Sloo v. Law*, 3 Blatchf. C. C. 457; *Parshall's App.* 65 Pa. St. 233; *Van Horne v. Fonda*, 5 Johns. Ch. 388. The advantages of any purchase result to the *cestuis que trust*; *King v. Cushman*, 41 Ill. 31; *Quackenbush v. Leonard*, 9 Paige, 334; *Schoonmaker v. Van Wyck*, 31 Barb. 457; *Barksdale v. Finney*, 14 Gratt. 338. The trustee must not make any contract disadvantageous to the *cestui que trust*, nor receive presents from him; *Green v. Winter*, 1 Johns. Ch. 26; *Andrews v. Hobson*, 23 Ala. 219; unless the dealings are clearly just and fair, the burden of proof being upon the trustee; *Harrington v. Brown*, 5 Pick. 519; *Jones v. Smith*, 33 Miss. 215; *Smith v. Isaac*, 12 Mo. 106. The *cestui que trust* is entitled to all profits arising from any purchases made by his trustee; *Wiswall v. Stewart*, 32 Ala. 433; *Mason v. Martin*, 4 Md. 124; *Smith v. Lansing*, 22 N. Y. 530; *Beeson v. Beeson*, 9 Barr. 279; if trustees trade or speculate, all the profits inure to the *cestuis que trust*, but any losses must be borne by the trustees; *Penman v. Slocum*, 41 N. Y. 53; *Brown v. Rickets*, 4 Johns. Ch. 303; *Durling v. Hammer*, 5 C. E. Green, 220; *Martin v. Raborn*, 42 Ala. 648; *Raynes v. Raynes*, 54 N. H. 201. A trustee must account for all profits received by him; *Van Epps v. Van Epps*, 9 Paige, 237; *Richardson v. Spencer*, 18 B. Mon. 450; attorneys who are trustees can make no charges for professional services in addition to their compensation as trustees, though they may employ other attorneys at the expense of the estate; *Binsse v. Paige*, 1 Keyes, 87; *Morgan v. Hannas*, 49 N. Y. 667; but see *Perkins's App.* 108 Pa. St. 314; 56 Am. Rep. 208; one reason for this is that a trustee cannot make a contract with himself; *Jenkins v. Fickling*, 4 Des. 470; *Mayer v. Galluchat*, 6 Rich. Eq. 2. A trust-

The right of the *cestui que trust* to an account of *mesne* rents and profits cannot very well be treated of without entering generally into the principles upon which relief in a Court of equity, in respect of *mesne* rents and profits, is founded.

An account of rents and profits may be sought in equity, either (I.) *Independently* of relief respecting the *corpus* of the land, or (II.) *As incident* or *collateral* to it.

*\*First.* Where the account is sought *independ-* [\*886]  
*ently* of other relief.

1. Account may be had against an express trustee without reference to the Statutes of Limitation. — If the account be sought against an *express trustee*, then, as the Statutes of Limitation do not run between trustee and *cestui que trust*, it will be directed from the time the rents were withdrawn (*a*).

2. Account in equity could not be had in respect of a legal title, except the account were complicated, &c. — If the claim to the rents rest upon a *legal* title, the plaintiff has then a *legal* remedy, and under the old practice could not have come into a Court of equity at all (*b*); except in cases where, from the complicated nature of the accounts, or other particular circumstances, a Court of law would have afforded very inadequate relief (*c*).

Or the plaintiff was an infant. — But an *infant* might have filed a bill for an account upon a legal title (*d*); as every

(*a*) See Attorney-General v. Brewers' Company, 1 Mer. 498; Mathew v. Brise, 14 Beav. 341.

(*b*) Jesus College v. Bloome, 3 Atk. 262; and see Dinwiddie v. Bailey, 6 Ves. 136; Taylor v. Crompton, Bunb. 95; Lansdown v. Lansdown, 1 Mad. 137.

(*c*) See O'Connor v. Spaight, 1 Sch. & Lef. 309; Corporation of Carlisle v. Wilson, 13 Ves. 276.

(*d*) Gardiner v. Fell, 1 J. & W. 22; Roberdeau v. Rous, 1 Atk. 543; Yallop v. Holworthy, 1 Eq. Ca. Ab. 7; Newburg v. Bickerstaffe, 1 Vern. 295; Curtis v. Curtis, 2 B.C.C. 631, per Cur.

tee cannot deny his title; Von Hurter v. Spengeman, 2 Green, Ch. 185; nor make any claim hostile to his *cestui que trust*; Benjamin v. Gill, 45 Ga. 110. Trustees must account for all trust property which comes into their possession, including the income or improvement; King v. Wise, 43 Cal. 628; Carr v. Houser, 46 Ga. 477. Any losses occurring when the trustee acts with the consent, and at the request of *cestuis que trust* who are *sui juris*, must be borne by the estate; Poole v. Munday, 103 Mass. 174.



person entering upon an infant's lands is regarded in the light of a bailiff or receiver for the infant (*e*); but the rule did not apply where the infant had never had possession, but it had been held by an adverse party (*f*). The jurisdiction against a person entering during the infant's minority remained, though the bill were not filed until after the infant attained twenty-one (*g*). But after six years the Statute of Limitations would be a bar (*h*).

**Or in the case of mines; or timber.**—And generally all persons might have an account upon a legal title in respect of *mines*, which are a species of trade (*i*), but not of *timber*, without praying an injunction (*j*).

**3. Whether after the death of the pernor an account might be had in equity against his executor.**—Although where a remedy lay at law an account could not be had in equity against the *pernor* of the profits himself, yet, after his decease, the party entitled to the profits might have considered himself a *creditor*, and have filed a bill in equity for an *account of the assets* (*k*).

[\*887] **\* 4. The account in these cases confined to the legal limit.**—Where, as in the preceding cases, a Court of equity assumed a concurrent jurisdiction with Courts of law, the account was not extended beyond the legal limit of six years, provided the statute were pleaded: it was otherwise,

(*e*) *Dormer v. Fortescue*, 3 Atk. 130, *per* Lord Hardwicke; *Pulteney v. Warren*, 6 Ves. 89, *per* Lord Eldon; *Morgan v. Morgan*, 1 Atk. 489; *Lord Falkland v. Bertie*, 2 Vern. 342, *per Cur.*; *Doe v. Keen*, 7 T. R. 390, *per* Lord Kenyon; *Hicks v. Sallitt*, 3 De G. M. & G. 782; *Pascoe v. Swan*, 27 Beav. 508.

(*f*) *Crowther v. Crowther*, 23 Beav. 305. But see the observations of V. C. in *Quinton v. Frith*, 2 I. R. Eq. 414.

(*g*) *Blomfield v. Eyre*, 8 Beav. 250; *Hicks v. Sallitt*, *ubi supra*.

(*h*) *Lockey v. Lockey*, Pr. Ch. 518; and see *Knox v. Gye*, 5 L. R. H. L. 674.

(*i*) *Bishop of Winchester v. Knight*,

1 P. W. 406; and see *Pulteney v. Warren*, 6 Ves. 89; *Lansdown v. Lansdown*, 1 Mad. 116; *Parrott v. Palmer*, 3 M. & K. 632.

(*j*) *Jesus College v. Bloome*, 3 Atk. 262; *Higginbotham v. Hawkins*, 7 L. R. Ch. App. 676; and see *Pulteney v. Warren*, 6 Ves. 89; *University of Oxford v. Richardson*, 1b. 701; *Grierson v. Eyre*, 9 Ves. 346; but see *Garth v. Cotton*, 1 Dick. 211; *Lee v. Alston*, 1 B. C. C. 194.

(*k*) *Monypenny v. Bristow*, 2 R. & M. 117 (but the bill also prayed delivery of title deeds); *Gardiner v. Fell*, 1 J. & W. 22 (but the plaintiff was also an infant); and see *Thomas v. Oakley*, 18 Ves. 186; *Lansdown v. Lansdown*, 1 Mad. 116.

if the defendant did not avail himself of the statute by demurrer, plea, or answer (*a*).

[5. **Present Practice.** — Now, by the recent Judicature Acts the several Divisions of the High Court of Justice have co-ordinate jurisdiction, and matters of account are assigned to the Chancery Division of the Court (*b*), and it is conceived that the same limit of time will apply to the account as formerly prevailed in the Court of Chancery, and the statute of limitations cannot be relied upon unless pleaded by the defendant (*c*).]

6. **Where a legal remedy did exist but has expired, equity will not assist.** — It often happens that a legal remedy *did* exist, but has since, by the death of a party or the determination of the estate, become extinguished. In such a case, as the right *was not*, but only *is*, without a remedy at law, there seems no ground in general for the interference of a Court of equity (*d*).

7. **Unless there be mistake.** — But if the remedy was lost through *mistake*, the Court upon that principle may interpose: as where a lease was held for the lives of A. and his two daughters B. and C., and A. afterwards married again, and had another daughter, who was also named B., and the landlord on the expiration of the lease by the death of the real *cestui que vie*, did not enter (B. the daughter by the second marriage being mistaken for B. the life named in the lease) Lord Macclesfield said, “Where one has title of entry, and neglects to enter or to bring his ejectment, but sleeps upon it for several years, *as he has no remedy at law for the mesne profits, so neither has he in equity*, for it was his own fault he did not enter, and he shall never come into a Court of equity for relief against his own negligence, or to make the tenant in possession who held over his lease to be but his bailiff or steward, whether he will or not; but in the present

(*a*) See *Monypenny v. Bristow*, 2 R. & M. 125.

[(*b*) 36 & 37 Vict. c. 66, s. 34.]

[(*c*) See Rules of the Supreme Court, 1883, Order 19, Rule 15.]

(*d*) *Barnewall v. Barnewall*, 3

Ridg. P. C. 71, *per* Lord Fitzgibbon; *Hutton v. Simpson*, 2 Vern. 722; *Norton v. Frecker*, 1 Atk. 525, 526, *per* Lord Hardwicke; and see *Pulteney v. Warren*, 6 Ves. 88.

case, *by reason of the circumstance of both daughters being of the same name, and the mistake consequent thereon*, the defendant must account for the *mesne* profits from the expiration of the lease" (e).

[\*888] \*8. **Or fraud.** — So equity will relieve where the remedy was prevented by *fraud*: as where A. was entitled to a leasehold estate, but B., concealing the deeds, remained in possession until the term had expired, Lord King directed an account of the rents and profits from the time that A.'s title accrued, on the ground that A. had been kept in ignorance of his just rights through B.'s fraudulent concealment of the deed and counterpart (a).

9. **Or some default in the defendant.** — And generally the Court will in all cases lend its aid where the legal process has been lost, not by any delay on the part of the plaintiff, but through *some default* of the defendant (b).

*Secondly.* An account may be sought as *incident or collateral* to the relief. The doctrines upon this subject were very distinctly laid down by Lord Fitzgibbon, afterwards Lord Clare, in *Barnewall v. Barnewall* (c).

A. — 1. **Plaintiff recovering the estate on an equitable title.** "The general rule of equity," he said, "is, that if the suit for recovery of possession be properly cognisable in a Court of *equity*, and the plaintiff obtains a decree, the Court will direct an account of rents and profits, as incident to such relief."

2. **Where cestui que trust follows trust estate into hands of a volunteer claiming under a trustee.** — In the case of a *cestui que trust*, who is following the trust estate into the hands of a person *claiming through the trustee*, under such circumstances that the defendant is himself to be regarded as a trustee, it

(e) *Duke of Bolton v. Deane*, Pr. Ch. 516. (Note, in this case Lord Hardwicke thought a remedy still existed at law, *Dormer v. Fortescue*, Ridge. Rep. t. Hardwicke, 190: but Lord Macclesfield was evidently of a different opinion, and so was Lord

Fitzgibbon, *Barnewall v. Barnewall*, 3 Ridg. P. C. 68.)

(a) *Bennett v. Whitehead*, 2 P. W. 644; and see *Duke of Bolton v. Deane*, Pr. Ch. 516, and *Barnewall v. Barnewall*, 3 Ridg. P. C. 66.

(b) *Pulteney v. Warren*, 6 Ves. 78.

(c) 3 Ridg. P. C. 66.

is clear that the *cestui que trust*, by establishing his claim to the land, has thereby established a right to the *mesne* rents and profits from the very commencement of his title (*d*). And *à fortiori* the rule is so where the plaintiff has been under the disability of infancy during the possession of the defendant, because then the latter is regarded as a bailiff or trustee for the former (*e*), or where there has been fraud or suppression on the part of the defendant.

3. **Where plaintiff comes as equitable owner against one in bonâ fide adverse possession.**—Where the case is that of a plaintiff coming forward not strictly as *cestui que trust*, but still as *equitable owner* to recover the estate against one in *bonâ fide adverse possession*, many of the older decisions and *dicta* point to the conclusion that, in the absence of special circumstances, the account will be directed from the time \*of the accruer of the title (*a*), subject only to [\*889] the qualification, that by analogy to the legal defence upon the Statute of Limitations, the account will not be carried back beyond six years before the institution of the suit (*b*). The more recent authorities seem, however, to establish that where there is no trust, no infancy, no fraud, and no suppression, where, in short, there is a mere *bonâ fide adverse possession*, the practice of the Court is not to carry back the account beyond the institution of the suit (*c*); unless at least there was a demand of possession by the plaintiff or acts equivalent thereto before proceedings were

(*d*) *Sturgis v. Morse*, 3 De G. & J. 1; 24 Beav. 541; *Wright v. Chard*, 4 Drew. 673; *Kidney v. Coussmaker*, 12 Ves. 168.

(*e*) *Hicks v. Sallitt*, 3 De G. M. & G. 782; *Schroder v. Schroder, Kay*, 591; *Pascoe v. Swan*, 27 Beav. 508; and cases cited p. 886, note (*e*).

(*a*) *Dormer v. Fortescue, Ridg. Rep. t. Hardwicke*, 183; S. C. 3 Atk. 130, *per Lord Hardwicke*; *Hobson v. Trevor*, 2 P. W. 191; *Coventry v. Hall*, 2 Ch. Ca. 134.

(*b*) *Reade v. Reade*, 5 Ves. 749, 750; *Harmood v. Oglander*, 6 Ves. 215; *Drummond v. Duke of St.*

*Albans*, 5 Ves. 439; *Stackhouse v. Barnston*, 10 Ves. 470.

(*c*) *Pulteney v. Warren*, 6 Ves. 93, *per Lord Eldon*; *Edwards v. Morgan, M'Clel.* 541, see 554, 555; *Hicks v. Sallitt*, 3 De G. M. & G. 813; *Thomas v. Thomas*, 2 K. & J. 79; *Morgan v. Morgan*, 10 L. R. Eq. 99; [but see *Hickman v. Upsall*, 4 Ch. D. 144, where the Court of Appeal were of opinion that in the absence of any special equitable considerations the account should by analogy to the legal rule be carried back for such a period as the Statute of Limitations allowed.]

taken, in which case the account will be carried back to the time of the demand or constructive demand (*d*).

4. **Where defendant ignorant of his true character of trustee.**—In one case, in which the plaintiff was an infant, and the defendant in fact a *trustee*, but *ignorant of his true character*, the account was limited to the filing of the bill, except as to money which had been paid into Court (*e*), but the decision is of doubtful authority (*f*).

5. **Where there has been laches in suing.**—If the *cestui que trust* or equitable owner be guilty of *laches*, the account will not [generally] be carried further back than to the time of the institution of the suit, for it was the plaintiff's own fault that he did not institute his suit at an earlier period (*g*); and if it be a case of *great laches*, the Court will show its displeasure by not directing an account beyond the date of the decree (*h*).

[But the Court will in its discretion allow the account to be carried back, where the circumstances of the case justify it, and the House of Lords has recently, in a case of great *laches*, carried the account back for six years prior to the institution of the suit (*i*).]

[\*890] \* 6. 3 & 4 W. 4, c. 27, not material. — It would seem that 3 & 4 W. 4, c. 27, has no bearing upon the question how far the account should be carried back, for the suit in these cases is not one for recovery of *rent* within the general purview of the Act (*a*); nor is it a suit within the meaning of the 42d section for the recovery of *arrears of rent*, which must mean arrears of some definite reserved rent, and not *mesne* profits. If there be any Statute of

(*d*) Penny v. Allen, 7 De G. M. & G. 409; and see Edwards v. Morgan, M'Clel. 554.

(*e*) Drummond v. Duke of St. Albans, 5 Ves. 433, see 439.

(*f*) See Hicks v. Sallitt, 3 De G. M. & G. pp. 811, 815.

(*g*) Dormer v. Fortescue, Ridg. Rep. t. Hardwicke, 183; S. C. 3 Atk. 130, per Lord Hardwicke; Cook v. Arnham, 2 Eq. Ca. Ab. 235; Pettward v. Prescott, 7 Ves. 541; Bowes

v. East London Waterworks Company, 3 Mad. 375; Pickett v. Loggon, 14 Ves. 215; Schroder v. Schroder, Kay, 591; [Smith v. Smith, 1 L. R. Ir. 206;] see Kidney v. Coussmaker, 12 Ves. 158.

(*h*) Acherley v. Roe, 5 Ves. 565.

[(*i*) Thomson v. Eastwood, 2 App. Cas. 215.]

(*a*) Grant v. Ellis, 9 M. & W. 113.

Limitations applicable by analogy it must be 21 James 1, cap. 16 (*b*).

7. **How the order for an account is worded.** — The order to account for *mesne* rents and profits will not, except in a case of gross fraud (*c*), contain the words, “which, *without neglect or default*, the defendant might have received,” and, on the other hand, a direction to make *just allowances* in taking the account will be inserted (*d*).

8. **Who is the person to account.** — The assignee who has had the perception of the rents and profits will, in the first instance, account for them, not, however, with interest (*e*). But if the assignee be insolvent, the trustee who tortiously assigned will then be answerable for the *mesne* rents and profits personally (*f*). The Court has also allowed distinct bills to be filed, first to recover the estate, and afterwards the *mesne profits* (*g*).

B. — 1. **If a person have a legal title he cannot sue in equity either for the estate or the mesne rents and profits.** — “If a man,” continued Lord Fitzgibbon, “have a mere *legal* title to the possession, he has no right to come into *equity* for the recovery of it; and if he has originally recovered the possession at *law*, he has no manner of right to proceed by *bill* for an account of rents and profits: as his title to the possession was at law, he must proceed for the whole there” (*h*).

2. **Unless the plaintiff be a dowress, or an infant.** — Upon this rule it must be remarked, that a *dowress* (*i*) and *infant* (*j*)

(*b*) See observations of L. J. Turner, Hicks v. Sallitt, 3 De G. M. & G. 816.

(*c*) Stackpoole v. Davoren, 1 B. P. C. 9.

(*d*) Howell v. Howell, 2 M. & Cr. 478.

(*e*) Macartney v. Blackwood, Ridg. Lapp. & Sch. 602.

(*f*) Vandebende v. Livingston, 3 Sw. 625.

(*g*) Hall v. Coventry, 2 Ch. Ca. 134; Wright v. Chard, 4 Drew. 673.

(*h*) Barnewall v. Barnewall, 3 Ridg. P. C. 66. See also Dormer v. Fortescue, 3 Atk. 130; Tilly v.

Bridges, Pr. Ch. 252; Owen v. Aprice, 1 Ch. Rep. 32; Anon. case, 1 Vern. 105, contradicted 3 Atk. 129.

(*i*) Mundy v. Mundy, 2 Ves. jun. 122; D'Arcy v. Blake, 2 Sch. & Lef. 387; Wild v. Wells, 1 Dick. 3; Meggot v. Meggot, 2 Id. 794; Goodenough v. Goodenough, 2 Id. 795; Curtis v. Curtis, 2 B. C. C. 620; Moor v. Black, Cas. t. Talbot, 126; and see Dormer v. Fortescue, 3 Atk. 130; Pulteney v. Warren, 6 Ves. 89; Agar v. Fairfax, 17 Ves. 552.

(*j*) See Dormer v. Fortescue, 3 Atk. 130, 134; S. C. Ridg. Rep. t. Hardwicke, 183, 191; Pulteney v.

are allowed to proceed in equity upon their legal title, and incidentally to the relief may pray an account of the *mesne* rent and profits. But by 3 & 4 W. 4, c. 27, s. 41, [\*891] the arrears of \*dower are recoverable for six years only next preceding the commencement of the suit. And the account of an infant will be barred, if he do not institute a suit within six years after he has attained his majority (a).

C. — 1. If a person applied to equity to aid his action at law he might have come back for an account. — “If a party,” Lord Fitzgibbon proceeded, “be obliged to come into a Court of *equity* for aid to enable him to prosecute his title at *law*” (as where he could not recover in a legal action by reason of an outstanding term, or because the title deeds to the estate were in the hands of the defendant), “after possession recovered at *law*, there may be cases in which he may come back for an account of rents and profits in the suit depending in *equity*” (b).

Or being obliged to come to equity on one ground, he might have obtained his whole relief there. — Or the plaintiff, being obliged to resort to equity on one ground, might, to prevent circuitry, have asked complete relief in the first instance in that Court; and if his title were established, an account of the rents and profits would have been consequential upon the relief (c).

2. But the account in equity would be restricted to the legal limit, or to the institution of the suit. — In these cases the account ought upon principle to be restricted to the same period as that for which the *mesne profits* were recoverable at law; for the plaintiff recovers upon a *legal* title, and the circumstance of his being obliged to sue in equity ought not to vary his rights; and there is authority to support this view (d); but in a later case (e) Vice-Chancellor Wood stated

Warren, 6 Ves. 89; Newburgh v. Bick-  
erstaffe, 1 Vern. 295.

(a) Lockey v. Lockey, Pr. Ch. 518;  
and see Knox v. Gye, 5 L. R. H. L. 674.

(b) See Dormer v. Fortescue, 3 Atk.  
124; S. C. Ridg. Rep. t. Hardwicke,  
176; Reade v. Reade, 5 Ves. 744.

(c) Townsend v. Ash, 3 Atk. 336;  
Edwards v. Morgan, M'Clel. 541;  
Reynolds v. Jones, 2 Sim. & St. 206.

(d) Reynolds v. Jones, 2 Sim. & St.  
206.

(e) Thomas v. Thomas, 3 K. & J.  
85.

the rule to be, that in an adverse suit *in the nature of an ejectment suit* the account is directed only from the filing of the bill; and there may be some difficulty in establishing a distinction between cases where the plaintiff sues upon a mere equitable title and cases where his title is rendered partially equitable, so to speak, by the existence of outstanding terms or estates.

3. **Unless the defendant be guilty of fraud.** — If the plaintiff has been kept out of the estate by the *fraud, misrepresentation, or concealment* of the defendant, the Court will suppose that, had the plaintiff known his just rights, he would have commenced his action at law on the first accruer of his title, and will then decree an account of the *mesne* rents and profits against the defendant from that period (*f*).

## \* SECTION II. [ \*892 ]

### THE RIGHT OF ATTACHING THE PROPERTY INTO WHICH THE TRUST ESTATE HAS WRONGFULLY BEEN CONVERTED.<sup>1</sup>

1. **General rule.** — If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust estate, so long as the metamorphosis can be traced.

**Tortious conversion.** — In *Taylor v. Plumer* (*a*) it was argued that although where the conversion was *in pursuance of the trust*, the newly acquired property would be bound by the original equity (*b*); yet where the conversion was *tortious*, then, as the property purchased was not in a form consistent with the trust, and the *cestui que trust* would be under no obligation to accept it in lieu of the rightful property, the *cestui que trust* should come in as a general creditor, and not be permitted to assert a specific lien. But the distinction

(*f*) *Dormer v. Fortescue*, Ridg. Rep. t. Hardwicke, 184, 185; S. C. 3 Atk. 130.

(*a*) 3 M. & S. 562.

(*b*) *Burdett v. Willett*, 2 Vern. 638;

*Ryall v. Rolle*, 1 Atk. 172; *Ex parte Chion*, 3 P. W. 187, note (A); *Waite v. Whorwood*, 2 Atk. 159; *Ex parte Sayers*, 5 Ves. 169; *Anon. case*, Sel. Ch. Ca. 57.

<sup>1</sup> See note in reference to the following of the trust estate.



was disallowed (c); for "An abuse of trust," said Lord Ellenborough, "can confer no rights on the party abusing it, nor on those who claim in privity with him" (d).

2. "**Money has no earmark.**"—**Bank notes and negotiable bills.**—It was said by Lord King that "*money* had no earmark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realise all his testator's estate, and afterwards die insolvent, yet a Court of equity could not charge or follow the land" (e); and *bank notes* and *negotiable bills*, have been represented as possessing the same quality. But the notion seems to have originated from some misconception, and cannot be supported. Lord Mansfield observed, "It has been quaintly said that the reason why money cannot be [\*893] \* followed is because it *has no earmark*, but this is not true. The true reason is upon account of the currency of it—it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration: but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank note—an action may lie against the finder, it is true, but not after it has been paid away in currency" (a). And Lord Ellenborough observed, "The dictum that *money has no earmark* must be understood as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other

(c) The same point has been viewed as not maintainable in several *previous* cases, as in *Whitecomb v. Jacob*, 1 Salk. 160; *Lane v. Dighton*, Amb. 409; *Ryal v. Ryal*, Ib. 413; *Balgney v. Hamilton*, Ib. 414. N. B. *Wilson v. Foreman*, 2 Dick. 593, is misreported; see *Lench v. Lench*, 10 Ves. 519. The subsequent cases are *Lord Chedworth v. Edwards*, 8 Ves. 46; *Greatley v. Noble*, 3 Mad. 79; *Buckeridge v. Glasse*, Cr. & Ph. 126; *Murray v. Pinkett*, 12 Cl. & Fin. 784; *Sheridan v.*

*Joyce*, 1 Jon. & Lat. 401; *Trench v. Harrison*, 17 Sim. 111; *Harford v. Lloyd*, 20 Beav. 310; *Frith v. Cartland*, 2 H. & M. 417.

(d) *Taylor v. Plumer*, 3 M. & S. 574.

(e) *Deg v. Deg*, 2 P. W. 414; and so his Lordship seems to have decided in *Cox v. Bateman*, 2 Ves. 19; and see *Waite v. Whorwood*, 2 Atk. 159; *Whitecomb v. Jacob*, 1 Salk. 160.

(a) *Miller v. Race*, 1 Burr. 457, 459.

money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far earmarked as to fall within the rule which applies to every other description of personal property, whilst it remains in the hands of the factor or his general legal representatives" (*b*). The only distinction, then, between *money*, *notes*, or *bills*, and *other chattels*, appears to be this — that the former, for the protection of commerce, cannot be pursued into the hands of a *bonâ fide* holder, to whom they have passed in circulation (*c*), whilst other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money (*d*), notes (*e*), and bills (*f*), may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they passed had express notice of the trust (*g*). And the only difference to be taken between *money* on the one hand, and *notes* and *bills* on the other, is that money is not earmarked, and therefore cannot be traced except under particular circumstances, but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty (*h*).

3. **Trust money mixed with the trustee's money.** — We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said, that the trust \* money has, like water, run into the general [\*894] mass, and become amalgamated, and therefore the *cestui que trust* has no *lien*. But clearly this cannot be maintained, for suppose a trustee, partly with his own money and

(*b*) *Taylor v. Plumer*, 3 M. & S. 575.

[(*c*) *Collins v. Stimson*, 11 Q. B. D. 142.]

(*d*) See *Taylor v. Plumer*, 3 M. & S. 575; *Miller v. Race*, 1 Burr. 457; *Howard v. Jemmet*, 3 Burr. 1389; *King v. Eggington*, 1 T. R. 370; *Ryall v. Rolle*, 1 Atk. 172.

(*e*) *Anon. case*, 1 Salk. 126; S. C. 1 Raym. 738; *Miller v. Race*, 1 Burr. 457; *Taylor v. Plumer*, 3 M. & S. 562.

(*f*) *Bennet v. Mayhew*, cited *Pulteney v. Darlington*, 1 B. C. C. 232, and *Cator v. Earl of Pembroke*, 2 B. C. C. 287; *Frith v. Cartland*, 2 H. & M. 417; and see *Ex parte Sayers*, 5 Ves. 169; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Ryall v. Rolle*, 1 Atk. 172; *Raphael v. Bank of England*, 17 C. B. 161.

(*g*) *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345.

(*h*) See *Ford v. Hopkins*, 1 Salk. 283.

partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a *lien* upon the whole for the amount that was misemployed (a). And it follows in the other case, that though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust in the general heap, the *cestui que trust* is entitled to take so much out (b).

4. **Assets employed in trade.** — Upon a similar principle, if a *surviving partner*, being the executor of a deceased partner, continue the testator's capital without authority in his trade, though the capital may consist only of the stock and debts of the partnership, and these may undergo a continual course of change and fluctuation, yet the Court follows the trust capital throughout all its ramifications, and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital so continually altered and changed (c).

5. **Money followed through a bank.** — And so if a trustee pay trust money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private monies of his own to the same account, the Court will disentangle the account, and separate the trust from the private monies, and award the former specifically to the *cestui que trust* (d). [And the same rule will apply equally in the case of a person occupying a fiduciary position, although not an express trustee, as a factor, or agent (e); and has even been applied to the case of a person borrowing money for a spe-

(a) *Lane v. Dighton*, Amb. 409; *Lewis v. Madocks*, 17 Ves. 57, 58; *Price v. Blakemore*, 6 Beav. 507; *Hopper v. Conyers*, 2 L. R. Eq. 549.

(b) See *Pennell v. Deffell*, 4 De G. M. & G. 382; *Ex parte Sayers*, 5 Ves. 169; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Frith v. Cartland*, 2 H. & M. 417; [*Re Hallett's Estate*, 13 Ch. D. 696.]

(c) See pp. 277, 278, *supra*.

(d) *Pennell v. Deffell*, 4 De G. M. & G. 372. The observations of L. J.

*Knight Bruce*, p. 381, are well worth a careful perusal. [*Re Hallett's Estate*, 13 Ch. D. 696; *Birt v. Burt*, 11 Ch. D. 773, note; and see *Ex parte Hardcastle*, 44 L. T. N. S. 523; 29 W. R. 615, where the case failed on the identification of the trust funds.]

[(e) *Re Hallett's Estate*, 13 Ch. D. 696, where the earlier cases are discussed; *Birt v. Burt*, 11 Ch. D. 773, note.]

cific purpose and not applying it for the purpose for which it was advanced (*f*). It was formerly held that] as against the *cestui que trust* the general rule must prevail that the sums drawn out must be attributed \*to the earliest [\*895] deposits, according to the order in which they were paid in (*a*); [but, where the question is only between the *cestui que trust* and the trustee, the rule has been modified, and so long as the trustee has monies of his own standing to the account, drawings by him for his private purposes will be attributed to his private monies, leaving the trust monies intact (*b*). This follows from the general principle that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally, and in fact, done wrongly; so far as possible the honest intention of drawing out his own money must be attributed to the trustee. Where, however, the trustee has exhausted his own monies, and the account at the bank is composed of monies belonging to different trusts, the general rule will prevail, and the sums drawn out will, in the absence of evidence to the contrary, be attributed to the earliest deposits (*c*).] If trust money be paid into a bank to an account headed in such a way that the banker cannot fail to know, and must be taken to know that it was a trust account, though the bankers are not bound to enquire into the propriety of the trustee's cheques upon that account, yet if the trustee becomes bankrupt and has overdrawn his *private* account, the bank cannot apply the credit of the *trust account* by way of set-off against the debit of the private account (*d*).

[But where a banking company were employed as agents to collect money and to remit it to their employers, and they received the money in cash and placed it with the other cash of the bank, and informed their employers that the money

[(*f*) *Gibert v. Gonard*, 52 L. T. N. S. 54; 33 W. R. 302; 54 L. J. N. S. 439; and see *Harris v. Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264.]

[(*a*) *Pennell v. Deffell*, 4 De G. M. & G. 372; *Frith v. Cartland*, 2 H. & M. 417; *Brown v. Adams*, 4 L. R. Ch. App. 764.]

[(*b*) *Re Hallett's Estate*, 13 Ch. D. 696; overruling *Pennell v. Deffell*, *ubi supra*, and the other earlier cases.]

[(*c*) *Re Hallett's Estate*, *ubi supra*.]

(*d*) *Ex parte Kingston*, 6 L. R. Ch. App. 632.

had been remitted, but before it was actually remitted the bank failed, it was held that the money was part of the general assets of the bank, and that the employers of the bank had no priority over the other creditors (*e*); but this case has been disapproved of by the Court of Appeal and cannot be regarded as law (*f*).

6. **Different trust funds intermixed.** — In a recent Scotch case where the funds of two charities had been intermixed and dealt with as a common fund, and part of the trust funds which, however, could be traced as having originally belonged to one of the charities had been invested in [\*896] land which \*subsequently increased very largely in value, it was held that the profit must be taken to have been made by the whole trust, and must be apportioned between the charities in the proportions in which they were originally entitled to the common fund (*a*).]

7. **Following money into land with reference to the Statute of Frauds.** — In tracing money into *land*, the principal difficulty in the old cases arose from the Statute of Frauds (*b*), the 7th section enacting that all declarations of trusts of land should be manifested and proved by some writing. It was formerly held that parol evidence, to prove a state of circumstances from which a Court of equity would elicit a constructive trust, was inadmissible (*c*); but Lord Hardwicke, on the ground that constructive trusts were excepted out of the Statute of Frauds (*d*), ruled that parol evidence might be given (*e*); and Sir T. Clarke, in the leading case of *Lane v. Dighton* (*f*) (though had the point been *res integra*, he should have thought the evidence not admissible within the statute) followed the authority of Lord Hardwicke; and

[(*e*) *Ex parte Dale and Company*, 11 Ch. D. 772; and see *Whitecomb v. Jacob*, 1 Salk. 160; *Ryall v. Rolle*, 1 Atk. 165, 172; *Ex parte Dumas*, 1 Atk. 232; *Scott v. Surman Willes*, 400.]

[(*f*) *Re Hallett's Estate*, 13 Ch. D. 696.]

[(*a*) *The Lord Provost, &c., of*

*Edinburgh v. The Lord Advocate*, 4 App. Cas. 823.]

(*b*) 29 Car. 2, c. 3.

(*c*) See *supra*, Chap. ix. s. 2, p. 167.

(*d*) By the 8th section; see p. 193, *supra*.

(*e*) *Ryal v. Ryal*, Amb. 413; and see *Anon. case*, Sel. Ch. Ca. 57.

(*f*) Amb. 409.

whatever doubts might formerly have been entertained upon the subject the law is now settled (*g*).

8. **Trustee bound to invest a certain sum, and purchasing at that price.** — The mere fact that a trustee has trust money in his hands when he makes a purchase, is not sufficient to attach the trust on lands bought by him (*h*). But if a trustee who is under an obligation to lay out money on land, purchase an estate at a price corresponding with the sum to be invested, the Court, independently of positive evidence, may presume the trust money to have been so applied (*i*). But no such presumption can be raised where it can be shown that the trustee, though under such an obligation, was mistaken in the nature of the trust, and acted under a different impression (*j*). And where a tenant for life with power to sell and invest in the purchase of other land, purchased lands with *borrowed monies*, and many years afterwards sold the settled estates, and applied the purchase money partly in discharge of the debts thus contracted by him, it was held that the purchased lands could not be treated as liable to the trusts of the settled estates (*k*).

9. **Covenant to settle his whole personal estate and a subsequent purchase is made.** — In *Lewis v. Madocks* (*l*), no evidence to connect any particular \*fund with the [\*897] estate was necessary, for a person having covenanted on his marriage to settle *all* the personalty he should acquire upon certain trusts, and having afterwards invested parts of his personalty on land, it was clear that the money expended upon the estate was bound by the trust, and could therefore be followed into the purchase.

10. **Whether cestui que trust can take the land itself, or has only a lien.** — Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the

(*g*) *Lench v. Lench*, 10 Ves. 517; 507; *Mathias v. Mathias*, 3 Sim. & G. 525.  
*Hopper v. Conyers*, 2 L. R. Eq. 549.

(*h*) *Sealy v. Stawell*, 2 I. R. Eq. 326. (*j*) *Perry v. Phelps*, 4 Ves. 108, see 113, 117.

(*i*) See *Anon. case*, Sel. Ch. Ca. 57; *Price v. Blakemore*, 6 Beav. (*k*) *Denton v. Davies*, 18 Ves. 499. (*l*) 8 Ves. 150; S. C. 17 Ves. 48.

land for the trust money and interest (*a*); but where the entire land is clearly the fruit of the trust fund, the *cestuis que trust* must upon principle have a right to take the land itself, whether the purchase was or not of the description authorised by the trust (*b*).

[11. **Trustee may follow trust money though he has concurred in breach.** — A trustee, who has himself concurred in a breach of trust whereby the trust estate has been improperly spent upon buildings upon his co-trustee's property, may, notwithstanding such concurrence, take proceedings against his co-trustee to follow the trust property (*c*).]

12. **Statute of Limitations.** — Where trust money is followed into the hands of a person who, as having received it by collusion, or with express notice of the trust, becomes himself a trustee, he is precluded from pleading the Statute of Limitations (*d*).

[13. **Repayment of trust money not a fraudulent preference.** — It is not a fraudulent preference on the part of a trustee who has misappropriated trust money to make it good on the eve of bankruptcy (*e*).

14. Money obtained by fraud cannot be followed into the hands of persons who take it in satisfaction of a *bonâ fide* debt without notice (*f*).]

(*a*) *Lane v. Dighton*, Amb. 409; *Lewis v. Madocks*, 8 Ves. 150; 17 Ves. 48, see 57; *Price v. Blakemore*, 6 Beav. 507; *Scales v. Baker*, 28 Beav. 91; *Hopper v. Conyers*, 2 L. R. Eq. 549.

(*b*) *Trench v. Harrison*, 17 Sim. 111. Lord Manners, in *Savage v. Carroll*, 1 B. & B. 265, see 284, seems to have thought otherwise; but this was before *Taylor v. Plumer*, p. 892, *supra*.

[(*c*) *Carson v. Sloane*, 13 L. R. Ir. 139; *Price v. Blakemore*, 6 Beav. 507.]

(*d*) *Ernest v. Croysdill*, 3 De G. F. & J. 175; 6 Jur. N. S. 740; *Rolfe v. Gregory*, 11 Jur. N. S. 97; S. C. 4 De G. J. & S. 576; see *post*, p. 900.

[(*e*) *Ex parte Stubbins*, 17 Ch. D. 58.]

[(*f*) *Northern Counties, &c. Insurance Company v. Whipp*, 26 Ch. D. 482, 495.]

## \* SECTION III.

[\*898]

OF THE REMEDY FOR A BREACH OF TRUST<sup>1</sup> AGAINST THE TRUSTEE  
PERSONALLY.

1. **Fraudulent Trustees' Punishment Act.** — We may remark *in limine* that, by a modern statute (a), a breach of trust has been made a *criminal* act, and that if a trustee of any property for the benefit of another person, or for any public or charitable purpose, *with intent to defraud*, appropriates the same to his own use or for any other purpose than the legitimate one, he is now to be deemed guilty of a *misdemeanour* and be liable to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. But no prosecution is to be commenced without the sanction of Her Majesty's Attorney-General, or, in the vacancy of that office, of the Solicitor-General; nor, where civil pro-

(a) 24 & 25 Vict. c. 96, ss. 80, 86, Vict. c. 54, which had been repealed  
re-enacting substantially 20 & 21 by 24 & 25 Vict. c. 94.

<sup>1</sup> If the trustee has been guilty of a breach, the *cestui que trust* may proceed against him personally, especially if the trust property cannot be traced; *Roberts v. Mansfield*, 38 Ga. 452; *Freeman v. Cook*, 6 Ired. Eq. 379; *Calhoun v. Burnett*, 40 Miss. 599; *Flagg v. Mann*, 3 Sumn. 86; it may be that the *cestui que trust* must elect whether he will proceed against the person or the property; *Baker v. Disbrow*, 18 Hun, 29; *Barker v. Barker*, 14 Wis. 131; the *cestui que trust* may have an action at law against his trustee, if the latter has been guilty of neglect; *Bennett v. Preston*, 17 Ind. 291; likewise after an accounting, though not before, for the balance; *Hall v. Harris*, 13 Ired. Eq. 289; *Prescott v. Ward*, 10 Allen, 203; *Dias v. Brunell*, 24 Wend. 9; *Underhill v. Morgan*, 33 Conn. 105; *Penobscot R. R. Co. v. Mayo*, 60 Me. 308; ordinarily a resort should be had to equity, unless, as above, there is some *legal* cause of action, *Brooks v. Brooks*, 11 Cush. 18; *Dorsey v. Garey*, 30 Md. 489; *Hearne v. Hearne*, 55 Me. 445; *Hukill v. Page*, 6 Biss. 183; *Peabody v. Harvard Coll.* 10 Gray, 283. A legal action is proper to compel the payment of money due; *Farrelly v. Ladd*, 10 Allen, 127; *Baker v. Biddle*, Bald. 394; *Catlin v. Birchard*, 13 Mich. 110. If a trustee sells at the wrong time, he is liable for the most the estate could sell for; *Melick v. Voorhees*, 24 N. J. Eq. 305; if a trustee sell, the *cestui que trust* may compel him to buy property equivalent in value; *Norman v. Cunningham*, 5 Gratt. 72; *Freeman v. Cook*, 6 Ired. Eq. 375; or to make the value of it as estimated when a bill was filed against him; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; or the value at the time of



ceedings have been taken, without the sanction of the Court of civil judicature before which the same are pending (*b*). And *no remedy* at law or in equity is to be *affected*, nor is the Act to *prejudice any agreement entered into or security given by any trustee*, having for its object the restoration or repayment of any trust property misappropriated.

2. **Effect of Act upon civil proceedings.**—This last mentioned enactment of the statute leaves the remedy of the *cestui que trust* in reference to civil proceedings exactly as it stood before the Act. It relieves him from such obligation, if any, as the statute might have been held to impose of prosecuting the fraudulent trustee before proceeding to recover his property (*c*); and, notwithstanding the general policy of the law (*d*), may perhaps be held to go so far as to authorise an agreement for the restoration of the trust prop-

(*b*) See *Wadham v. Rigg*, 1 Dr. & Sm. 216.

(*c*) As to the necessity for prosecuting before taking civil proceedings in cases of *felony*, see *Cox v. Paxton*, 17 Ves. 329; *White v. Spettigue*, 13 M. & W. 603; *Scattergood v. Sylvester*, 15 Q. B. 506; [*Midland In-*

*surance Company v. Smith*, 6 Q. B. D. 561; *Rooke v. D'Avigdor*, 10 Q. B. D. 412.]

(*d*) See *Keir v. Leeman*, 9 Q. B. 371; [*Williams v. Bayley*, 1 L. R. H. L. 200; *Flower v. Sadler*, 10 Q. B. D. 572.]

sale; *Johnson v. Lewis*, 2 Strob. Eq. 157; *Norman v. Cunningham*, 5 Gratt. 64. If the trust property is destroyed in whole or in part, the trustee must account for it; *Sanders v. Rogers*, 1 S. C. 452; *State v. Foy*, 65 N. C. 265; *Howe v. School Dist.* 43 Vt. 282. If a trustee embezzle the trust fund, he may be indicted; *Shaw v. Spencer*, 100 Mass. 388.

The trustee must put the *cestui que trust* in full possession of the condition of affairs, or no agreement will bind him; *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177. If the trustee do some open unequivocal act, which is in reality a denial of the rights of the *cestui que trust*, he is guilty of a breach; *Norris's App.* 71 Pa. St. 124; if the trustee is guilty of loaning trust funds to a third person, the latter must indemnify the trustee, and if he has the property in hand, equity will compel him to restore it; *Abbott's Ex'rs v. Reeves*, 49 Pa. St. 494; 88 Am. Dec. 510. If an assignee of a mortgage is a party to a fraud, he takes in trust for the *cestui que trust*; *Dey v. Dey*, 26 N. J. Eq. 182; *Ross v. Fitzgerald*, 32 N. J. Eq. 838. If a trustee is guilty of breach, he is not entitled to any commissions; *Singleton v. Lowndes*, 9 S. C. 465. If a trustee makes an unauthorized loan, he is guilty of a breach; *N. C. R. R. Co. v. Wilson*, 81 N. C. 223; likewise if he purchase at his own sale; *Yeackel v. Litchfield*, 13 Allen, 417. There is no sufficient remedy in *quo warranto*; *Dart v. Houston*, 22 Ga. 506. To apply property to support the preaching of any other doctrine than that appointed, is a breach; *Combe v. Brazier*, 2 Desau. 431; see also as to breach, *Woodbury v. Bruce*, 59 Vt. 624; *Wilkinson v. Dodd*, 40 N. J. Eq. 123; *Dodd v. Wilkinson*, 41 N. J. Eq. 566.

erty even though the withdrawal of an indictment against the trustee be one of the terms of the arrangement.

**\* 3. Where a solicitor is party to a breach of trust. [\*899]**

— A solicitor, who *wilfully advises a breach of trust*, is liable to be struck off the roll (a). And *à fortiori* a solicitor, who, being a trustee, himself commits a *wilful breach of trust*, is amenable to the same penalty (b). But a solicitor is not liable as a constructive trustee for the consequences of acts done by such solicitor, *pursuant to instructions* from his clients, who are trustees, and exercising their legal powers, unless the solicitor either receive some part of the trust property or assist with knowledge in some dishonest and fraudulent design on the part of his clients (c). Thus a testator devised and bequeathed his residuary estate to Crush, Lugar, and Addy, his three trustees and executors, upon trust for his four children, viz. Ann (who married Barnes), Susan (who married the trustee, Addy), and William and Mary. The shares of Ann and Susan were to be held upon trust for their separate use, respectively, without power of anticipation, with remainder to their children; and the will contained a power of appointment of new trustees vested in the executors, but there was no authority to diminish their number. Crush renounced and disclaimed, and Clarke was appointed in his place; but Lugar and Clarke both died, and Addy became sole trustee of the trust fund. The shares of Susan and William had been satisfied, and Mary's share was not in question; but as to the share of Ann, the wife of Barnes, there being disputes between Addy, the trustee, and Barnes, Addy instructed his solicitor, Duffield, to appoint Barnes sole trustee in the place of Addy, so far as regarded the share of Ann Barnes. Duffield represented the danger of placing the fund under the power of a single trustee, and advised Addy not to do it; but, as he persisted, he advised him at all events to take a deed of indemnity. Duffield afterwards declined to proceed unless a separate solicitor acted for Mrs. Barnes

(a) *Goodwin v. Gosnell*, 2 Coll. 457, see p. 462.

(c) *Barnes v. Addy*, 9 L. R. Ch. App. 251, *per* Lord Selborne.

(b) *Re Chandler*, 22 Beav. 253; *Re Hall*, 2 Jur. N. S. 633.

and her children, and Preston was thereupon appointed such solicitor, and he wrote to Ann Barnes a letter explanatory of the risk, but nevertheless Ann Barnes wished it to be done. The deed of appointment of Barnes as sole trustee, and the deed of indemnity which had been proposed by Duffield, were then approved by Preston and executed; and Addy transferred the share of Ann Barnes (amounting, after certain deductions, to 2074*l.* consols), into the name of Barnes, who the next day sold it out, and applied the proceeds in his business and became bankrupt. The fund having been lost, the children of Ann Barnes filed their bill against the [\*900] \*administratrix of Addy (then deceased), and against Duffield and Preston, to compel them to restore the trust fund. Addy's estate was declared liable, but the bill was dismissed as against Duffield and Preston. The plaintiffs appealed from this dismissal, and rested their case on the solicitors being parties to a threefold breach of trust, viz., first, the appointment of a single trustee; secondly, the transfer of the fund into the name of a sole trustee; and, thirdly, the division of the fund, so that there should be a separate trustee of each part. There was no evidence that either Duffield or Preston suspected, or had reason to suspect, the good faith of Barnes, and Lord Selborne and Lord Justice James concurred in the principle above laid down, and dismissed the appeal with costs (a).

4. **Civil proceedings.**—As regards *civil* proceedings for compensation against the trustee, the *cestui que trust*, in the event of a breach of trust, is entitled to institute proceedings against the trustee to compel a compensation from him personally for the loss which the trust estate has sustained; and if the plaintiff has a vested interest and has reason to apprehend that the trustee is going abroad, he may obtain a writ of *ne exeat regno* (b). [But the breach of trust must be

(a) *Barnes v. Addy*, 9 L. R. Ch. App. 244.

(b) *Hawkins v. Hawkins*, 1 Dr. & Sm. 75. As to the assignment of a right to sue for redress in respect of a breach of trust, see *Hill v. Boyle*, 4 L. R. Eq. 260. If a trustee has made

default in payment of a trust fund which was in his hands, and was misapplied, he can be attached, though he may have spent the money before the date of the order for payment, and is unable to pay, and such trustee is within the third exception of the

brought home to the trustee, and if there is a doubt whether the trustee has acted honestly and *bonâ fide* in the discharge of his duty, although he may have made mistakes, the doubt should be determined in favour of the trustee (c).]

5. **Statute of Limitations.**—This right to sue is not affected by the Statute of Limitations (d). And even a trustee, who was also a *cestui que trust* in \*remain- [\*901] der, and by whose neglect the tenant for life got possession of the fund, has been allowed, notwithstanding the statute, to recover it from the estate of the tenant for life who wrongfully possessed himself of it (a); and an agent who collects debts for his employer under a power of attorney to collect debts and hold the proceeds upon certain trusts, is regarded as a trustee, and cannot plead the statute (b). [So directors of a company who have improperly

Debtors' Act, 32 & 33 Vict. c. 62, s. 4; *Middleton v. Chichester*, 6 L. R. Ch. App. 152.

[(c) *Per* Jessel, M. R.; *Re Owens*, 47 L. T. N. S. 61.]

(d) *Phillipo v. Munnings*, 2 M. & C. 309; *Browne v. Radford*, W. N. 1874, p. 124; *Milnes v. Cowley*, 4 Price, 103; *Cator v. Croydon Railway Company*, 4 Y. & C. 405; *Downes v. Bullock*, 25 Beav. 61; *Clark v. Hoskins*, 36 L. J. N. S. Ch. 689; *Butler v. Carter*, 5 L. R. Eq. 276; *Brittlebank v. Goodwin*, 5 L. R. Eq. 545; *Hartford v. Power*, 2 Ir. Rep. Eq. 204; *Woodhouse v. Woodhouse*, 8 L. R. Eq. 514; *Burdick v. Garrick*, 5 L. R. Ch. App. 233; *Stone v. Stone*, 5 L. R. Ch. App. 74; *Mutlow v. Bigg*, 18 L. R. Eq. 246, reversed on other grounds, 1 Ch. D. 385; *Watson v. Saul*, 1 Giff. 188; *Harris v. Harris* (No. 2), 29 Beav. 110; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Rolfe v. Gregory*, 11 Jur. N. S. 98; S. C. 4 De G. J. & S. 576; and see *Bright v. Legerton*, 2 De G. F. & J. 606; *Tyson v. Jackson*, 30 Beav. 384; *Cresswell v. Dewell*, 4 Giff. 460; *Burrows v. O'Brien*, 15 Ir. Ch. Rep. 424; *Burrows v. Gore*, 6 H. L. C. 907; [Met-

*ropolitan Bank v. Heiron*, 5 Ex. D. 319.] As to the cases of *Dunne v. Doran*, 13 Ir. Eq. R. 545, and *Brereton v. Hutchinson*, 3 Ir. Ch. Rep. 331; see *Brittlebank v. Goodwin*, 5 L. R. Eq. 551. But see *Carroll v. Hargrave*, 5 I. R. Eq. 123. As to suits between solicitor and client, see *Re Hindmarsh*, 1 Dr. & Sm. 129.

(a) *Butler v. Carter*, 5 L. R. Eq. 276.

(b) *Burdick v. Garrick*, 5 L. R. Ch. App. 233. Solicitors receiving money in the character of agents can in general plead the statute; *Re Hindmarsh*, 1 Dr. & Sm. 129; *Watson v. Woodman*, 20 L. R. Eq. 721; but not so where they receive monies bound expressly by a particular trust of which they are consant; see *Burdick v. Garrick*, 5 L. R. Ch. App. 240; [and see *Power v. Power*, 13 L. R. Ir. 281, where the principle was laid down, that "where there is not merely an agency between the parties, but also a superadded fiduciary relation, the remedy of the principal, who is then also the *cestui que trust*, is not one arising merely from contract, or duty springing from such contract, where a common law liability would

paid dividends out of capital cannot plead the statute (c).] And the personal representative of a deceased trustee who has committed a breach of trust, or a legatee or next of kin in possession of the assets, with notice of the breach of trust (d), cannot plead the statute, but must be answerable in the same way as the testator or intestate would have been (e). But though the statute cannot be pleaded in bar, yet where the trust fund has no actual existence, but the suit is for damages, gross *laches* will *per cursum cancellarice* disentitle a plaintiff to relief, the Statute of Limitations leaving it open to a Court of equity to act upon its own rule as to laches and acquiescence (f). [And where a suit is founded on a breach of duty or fraud committed by a person in the position of a trustee, as where a director receives a bribe to neglect his duty, time will commence to run so soon as the fraud has been discovered (g).]

6. 36 & 37 Vict. c. 66. — By a recent statute, 36 & 37 Vict. c. 66, s. 25, subs. 2, it is expressly enacted that no claim by a *cestui que trust* against his trustee in respect of any breach of an express trust, shall be barred by any statute of limitations. But 37 & 38 Vict. c. 57, s. 10, enacts that from 1st January, 1879, no money or legacy [\*902] *charged on any land \* or rent* shall, though *secured by an express trust*, be recoverable but within the time allowed for recovery had there been no express trust (a).

7. **Trust money taken by a firm.** — Where the trustee is one of a firm, and trust money finds its way into the coffers of the firm, with the *sanction of the partners*, and is misapplied, not only the trustee but the partners also are liable (b). And if

alone exist, but is one to be dealt with on the equitable relation of trustee and *cestui que trust*.”]

[(c) *Re Flitcroft's case*, 21 Ch. D. 519.]

(d) *Woodhouse v. Woodhouse*, 8 L. R. Eq. 514; see p. 521.

(e) *Story v. Gape*, 2 Jur. N. S. 706; *Obee v. Bishop*, 1 De G. F. & J. 137; *Brittlebank v. Goodwin*, 5 L. R. Eq. 545. But see the Irish cases,

*Dunne v. Doran*, 13 Ir. Eq. Rep. 545; *Brereton v. Hutchinson*, 3 Ir. Ch. Rep. 361; *Carroll v. Hargrave*, 5 I. R. Eq. 123.

(f) *Philips v. Pennefather*, 8 I. R. Eq. 486, *per Sir Jos. Napier*, C. S.

[(g) *Metropolitan Bank v. Heiron*, 5 Ex. D. 319.]

(a) See *ante*, p. 885.

(b) *Eager v. Barnes*, 31 Beav. 579.

one of a firm of solicitors, in transacting business with trustees, practise a fraud upon the trustees, the co-partners are liable (c).

8. **Corporation liable for breach of trust.** — The remedy for a breach of trust lies against a *corporation* as well as against an individual; and a municipal corporation since the Municipal Corporation Act, is liable for a breach of trust committed before the Act (d).

9. **Land tortiously sold.** — If a trustee dispose of the trust estate to a purchaser for valuable consideration *without notice*, the *cestui que trust* may compel the trustee to purchase other lands of equal value to be settled upon the like trust (e), or the *cestui que trust* may at his option take the proceeds of the sale, with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements (f).

[10. **Trustee allowing husband to misapply the fund.** — If a trustee for the separate use of a married woman for life allow the husband to get possession of and misapply the trust fund without the wife's knowledge, he is liable for the income which would but for the breach of trust have accrued on the fund, notwithstanding that the married woman had acquiesced in the payment of the income prior to the breach of trust to her husband, for in such a case no assent on her part to the retainer by the husband of the subsequent income can be presumed (g).]

11. **Neglect to accumulate.** — Where a testator had directed an investment in Three per Cent. Consolidated Bank Annuities and an *accumulation* of the dividends, the trustee was decreed to purchase the sum of stock which the fund, if regularly invested, would have produced, and to make good the amount due in respect of subsequent accumulation (h).

(c) *Sawyer v. Goodwin*, 36 L. J. N. S. Ch. 578; *Long v. Hay*, W. N. 1871, p. 134.

(d) *Attorney-General v. Corporation of Leicester*, 9 Beav. 546.

(e) See *Manseil v. Mansell*, 2 P. W. 681; *Vernon v. Vaudrey*, Barn.

303; *Macnamara v. Carey*, 1 Ir. R. Eq. 23; and see 37 & 38 Vict. c. 78.

(f) See *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 35; but see *Denton v. Davies*, 18 Ves. 504.

[(g) *Dixon v. Dixon*, 9 Ch. D. 587.]

(h) *Pride v. Fooks*, 2 Beav. 430; see *Byrchall v. Bradford*, 6 Mad. 13;

12. **Covenant to transfer stock.** — If a settlement contain a covenant for the transfer of stock, [or the creation [\*903] of a charge upon property,] and the trustee *\*neglects to enforce the transfer (a)*, [or *the creation of the charge (b)*,] he is liable for all the consequences.

13. **Neglect to sell.** — So if there be a trust for sale, and the trustee *neglects to sell* for a great length of time, whereby the property is deteriorated, he is answerable for the loss (c).

14. **Policy forfeited.** — If a trustee suffer a *policy of insurance to become forfeited* through neglect to pay the premiums, he is bound to make good the loss to the *cestui que trust (d)*; provided, that is, he had funds in hand for payment of the premiums, for if he had none and could procure none, he would be exempt from liability (e). He may, however, either advance money himself, or borrow it from another on the security of the policy, and a *lien* on the policy will be allowed (f). If there be no means of keeping up the policy the Court will direct it to be sold or surrendered (g).

[15. **Policy improperly given up to husband and surrendered by his mortgagee.** — In a recent case where a trustee had neglected to give notice of a settlement affecting a policy to the insurance office, and had, in contemplation of a breach of trust, retired in favour of a single trustee, who allowed the husband to get possession of the policy, whereupon he

S. C. Id. 235; and see *ante*, pp. 335, 336.

(a) *Fenwick v. Greenwell*, 10 Beav. 412.

[(b) *Cleary v. Fitzgerald*, 7 L. R. Ir. 229.]

(c) *Devaynes v. Robinson*, 24 Beav. 86; *Sculthorpe v. Tipper*, 13 L. R. Eq. 232.

(d) *Marriott v. Kinnersley*, Taml. 470.

(e) Now so decided, *Hobday v. Peters* (No. 3), 28 Beav. 603.

(f) *Clack v. Holland*, 10 Beav. 273, 276, *per Cur.*; *Re Layton's Policy*, W. N. 1873, p. 49; and see *Johnson v. Swire*, 3 Giff. 194; *Todd v. Moorhouse*, 19 L. R. Eq. 69. [The only cases in which a lien upon the

monies secured by a policy can be created in favour of a mere stranger, or a part owner by payment of premiums are the following: 1. By contract with the beneficial owner of the property. 2. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation. 3. By subrogation to this right of trustees of some person who has at their request advanced money for the preservation of the property. 4. By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property; *Re Leslie*, 23 Ch. D. 552.]

(g) *Hill v. Trenery*, 23 Beav. 16; *Beresford v. Beresford*, Ib. 202.

had received a bonus and mortgaged the policy, and the mortgagee had surrendered it; it was held that, although there were no funds available for keeping up the policy, the original trustee, inasmuch as there was a clear breach of trust in neglecting to give notice to the office and in parting with the possession of the policy, was liable for the amount of the bonus and of the monies received on the surrender (*h*).

16. **Director accepting shares from promoters.**—Where a director of a company accepted fully paid up shares from the promoters, under circumstances which were held to amount to a misfeasance on his part, and the shares, which at one time had been worth £80 a share, had become so much depreciated \*as to be worth only £1 a share, [\*904] it was held that the director was a trustee of the shares for the company, that restitution of the shares by the director was not sufficient, but that the company might elect to have the value of the shares, and that the value was to be taken at £80 a share, which was to carry interest at £4 per cent. from the date of the transfer to the director (*a*).]

17. **Neglect to give notice of assignment.**—If the trustees of a marriage settlement take by assignment *choses en action* of the husband, and neglect to give notice of the settlement to the persons in whom the *choses en action* are vested, and on the bankruptcy of the husband the *choses en action*, as left in his order and disposition with the consent of the true owner, become forfeited in favour of the creditors, it is apprehended that the trustees would be liable for their neglect of duty in not having given notice of the settlement, so as to take the property out of the order and disposition of the settlor (*b*).

18. **Registration.**—So if the trustee of a deed which requires *registration* to protect the property neglect to register it, he is answerable for the consequences (*c*).

[*h*] Kingdon v. Castleman, 46 L. J. N. S. Ch. 448.]

[*a*] Nant-y-Glo and Blaina Iron-works Company v. Grave, 12 Ch. D. 738.]

[*b*] As to what particulars are within the operation of the clause, see [46 & 47 Vict. c. 52, s. 44; and ante, p. 242.]

[*c*] Macnamara v. Carey, 1 Ir. Rep. Eq. 9.



19. **Power imperative.**—A trust is sometimes in the form of a *power imperative*; that is, a power which it is the bounden duty of the trustee to execute, and if through his neglect to execute it a loss arises he will be held responsible (*d*).

20. **Receipt by person not a trustee, but acting as such.**—If a person has *assumed to act as trustee*, and having received money in that character misapplies it, he is accountable for the proceeds to the *cestui que trust*, and cannot defend himself by showing that in fact he was not legally a trustee (*e*), or that when he committed the breach he did not know who his *cestui que trust* was (*f*). But the trustee of a devised estate will not be accountable for property comprised in the devise, but the existence of which did not come to his *knowledge*, and which he was not *bound to have discovered* (*g*).

21. **Wilful default.**—If an action be brought for an [\*905] account and the plaintiff seeks \*relief against *wilful default*, he must in his pleadings allege some *specific act* of wilful default (*a*), and *pray* consequential relief; and at the hearing must *prove* some act of wilful default, or at least establish a case for enquiry (*b*); and *a fortiori* where, at the original hearing, the common accounts only were directed, it is too late to ask relief on further directions against any wilful act that may have transpired accidentally in the course of other enquiries (*c*); and a trustee cannot be declared liable for wilful default upon a *common order* made at chambers for the administration of the testator's estate (*d*).

(*d*) *Luther v. Bianconi*, 10 Ir. Ch. Rep. 194.

(*e*) *Rackham v. Siddal*, 16 Sim. 297; affirmed on appeal to the extent of the interest of the plaintiff, the tenant for life, 1 Mac. & G. 607; *Pearce v. Pearce*, 22 Beav. 248; and see *Derbishire v. Home*, 3 De G. M. & G. 80; *Hope v. Liddell*, 21 Beav. 183; *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 58; *Hennessey v. Bray*, 33 Beav. 96; *Ex parte Norris*, 4 L. R. Ch. App. 280; *Yardley v. Holland*, 20 L. R. Eq. 428; *Smith v. Smith*, 10 Ir. Rep. Eq. 273.

(*f*) *Ex parte Norris*, 4 L. R. Ch. App. 280.

(*g*) *Youde v. Cloud*, 18 L. R. Eq. 634.

(*a*) *Bond v. McWatty*, 14 Ir. Ch. Rep. 174; *Wildes v. Dudlow*, W. N. 1870, pp. 85, 231; [and see *Mayer v. Murray*, 8 Ch. D. 424; *Smith v. Armitage*, 24 Ch. D. 727.]

(*b*) *Sleight v. Johnson*, 3 K. & J. 292.

(*c*) *Coope v. Carter*, 2 De G. M. & G. 292; *Askew v. Woodhead*; 28 L. T. N. S. 465; 21 W. R. 573.

(*d*) *Re Fryer*, 3 K. & J. 317; *Partington v. Reynolds*, 4 Drew. 253; *Re Delevante*, 6 Jur. N. S. 118; but see *Brooker v. Brooker*, 3 Sm. & G. 475.

But if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions (*e*). And if relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an enquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further directions, as before that time the Court was not in a condition to deal with the question (*f*); [and under the modern practice where the statement of claim alleges wilful default the Court may at any stage of the proceedings direct accounts and enquiries upon that footing (*g*). But where there are allegations of wilful default or improper conduct on the part of the defendants, it is the duty of the plaintiff to be ready at the hearing to prove such allegations, and the Court will not, unless a strong case is made out for so doing, postpone the enquiry into the conduct of the trustees, where the plaintiff was not in a position at the hearing to go into the charges (*h*).] And in a *redemption suit* it is not necessary that the plaintiff should charge wilful default (*i*); nor is the case altered if the deed though in substance a security, be in the form of a deed of trust (*j*). And in a case under the old practice it was held that where *executors filed a bill* for the administration of their testator's estate, it was competent to a *defendant* to allege by his *answer* a case of \* wilful default by the executors, and that on proof [\*906] of it at the hearing, the Court would give the necessary directions without obliging the defendant to file a cross bill (*a*). It is not competent to a remainderman to institute proceedings for relief against wilful default in respect

(*e*) *Shaw v. Turbett*, 13 Ir. Ch. Rep. 476.

(*f*) *Pattenden v. Hobson*, 1 Eq. Rep. 28.

(*g*) *Job v. Job*, 6 Ch. D. 562; *Re Symons*, 21 Ch. D. 757; *Mayer v. Murray*, 8 Ch. D. 424; and see *Laming v. Gee*, 10 Ch. D. 715.]

[(*h*) *Smith v. Armitage*, 24 Ch. D. 727.]

[(*i*) *Mayer v. Murray*, 8 Ch. D. 424.]

(*j*) *O'Connell v. O'Callaghan*, 15 Ir. Ch. Rep. 31.

(*a*) *Harvey v. Bradley*, 4 L. R. Eq. 13.

of the *prior life estate*, for he has no interest in the income, but only in the corpus (*b*).

22. **Suit against trustee's personal representative.**—An executor or administrator of a trustee will be answerable for a breach of trust, though he may have distributed the assets amongst the legatees or next of kin without previous notice of the breach of trust (except it was done under the sanction of the Court (*c*), or under the provisions of Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 29); and the Statute of Limitations affords him no protection (*d*): or the *cestui que trust*, if he has not been lying by while the rights of the defendants have been varied by lapse of time (*e*), may recover the assets directly from the legatees or next of kin amongst whom they have been distributed (*f*).

23. **Breach of trust an equitable debt only.**—The *debt* constituted by a *breach of trust* is even after it has been established by a decree an *equitable debt* only, and until the Bankruptcy Act, 1869, would not have supported a petition in bankruptcy (*g*).

24. **Breach of trust constitutes simple contract debt, unless the trustee has covenanted.**—The claim of the *cestui que trust* is in general a *simple contract debt*, and therefore, until the late Act, making a person's whole real and personal estate liable to his simple contract debts, it was recoverable, not from the real, but only from the personal estate. But if the trustee sign the trust deed and engage under his hand and seal, by words that amount to a covenant at law, to execute the trust, then the breach of trust becomes a specialty debt (*h*).

(*b*) *Whitney v. Smith*, 4 L. R. Ch. App. 513.

(*c*) *Knatchbull v. Fearnhead*, 3 M. & Cr. 122; *March v. Russell*, 3 M. & Cr. 31; *Low v. Carter*, 1 Beav. 423; *Hill v. Gomme*, *Ib.* 540; *Underwood v. Hatton*, 5 Beav. 39; *Waller v. Barrett*, 24 Beav. 413.

(*d*) See p. 897, *ante*.

(*e*) *Ridgway v. Newstead*, 3 De G. F. & J. 474.

(*f*) *March v. Russell*, 3 M. & Cr. 31; *Knatchbull v. Fearnhead*, 3 M. & Cr. 126; *Underwood v. Hatton*, 5 Beav. 38.

(*g*) *Ex parte Blencowe*, 1 L. R. Ch. App. 393. See 32 & 33 Vict. c. 71, s. 6, and *Ex parte Sturt & Co.* 13 L. R. Eq. 309; [and see now 46 & 47 Vict. c. 52, s. 6; which although not specially mentioning equitable debts includes them.]

(*h*) See *supra*, pp. 206, 208.

25. **Retainer by personal representative of insolvent trustee.** — If a [sole] trustee die insolvent and indebted to the trust estate, the personal representative of the trustee has a *right of retainer* in respect of the debt to the trust as against other creditors, and on the *cestuis que trust* requiring him to exercise such right of retainer, he is bound to do so (i).

\* 26. **Immaterial whether trustee was gainer or loser** [\*907] **by the breach of trust.** — In awarding compensation to the *cestui que trust* against the trustee, the Court pays no regard to the circumstance whether the trustee *derived any actual advantage or not*, but proceeds upon the principle, that a trustee, who deviates from the line of his duty, is under an obligation to make good the loss to the *cestui que trust* (a): and if a trustee be guilty of misconduct, and a loss follows, the Court does not acquit him, because the loss was more immediately caused by some event wholly beyond the control of the trustee, such as fire, lightning, or other accident (b). “Although,” said Lord Cottenham, “a personal representative acting *strictly* within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds, or upon securities, not authorised, or be put within the control of persons who ought not to be entrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the

(i) *Sander v. Heathfield*, 19 L. R. Eq. 21; [*Crowder v. Stewart*, 16 Ch. D. 368; *Re Dunning*, 33 W. R. 760; 54 L. J. Ch. 900. But see *ante*, p. 831, as to the right of the creditors to have the estate administered in Bankruptcy.]

(a) See *Dornford v. Dornford*, 12 Ves. 129; *Raphael v. Boehm*, 13 Ves. 411; S. C. Ib. 590, 591; *Moons v. De Bernaldes*, 1 Russ. 305; *Adair v. Shaw*,

1 Sch. & Lef. 272; *Lord Montford v. Lord Cadogan*, 17 Ves. 489; *Scurfield v. Howes*, 3 B. C. C. 90; but see *Attorney-General v. Greenhouse*, 1 Bligh, N. S. 57-59.

(b) See *Caffrey v. Darby*, 6 Ves. 496; *Cocker v. Quayle*, 1 R. & M. 535; *Fyler v. Fyler*, 3 Beav. 508; *Kellaway v. Johnson*, 5 Beav. 324; *Munch v. Cockerell*, 5 M. & Cr. 212; *Gibbins v. Taylor*, 22 Beav. 344.

course adopted, and however free such conduct may have been from any improper motive" (c).

27. **Case of trustee bringing a profit as well as a loss to the trust.** — And a trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of a trust fund, cannot *set off against his liability a gain* which has accrued to another portion of the trust fund through another distinct and wholly unconnected breach of trust (d); and even in the *same matter*, where executors were directed to convert the testator's property and invest it in Government or real securities, and they allowed the tenant for life for eleven years to receive 10 per cent. on an Indian loan, and then invested the capital in a purchase of Bank Annuities, and the stock purchased was considerably more than could have been purchased with the same capital at the end of one year from the testator's death, they were not only made liable for

the excess of interest paid to the tenant for life, but [\*908] were disallowed their claim \*to set off against their

liability the accidental advantage accruing to the trust from a purchase of a larger sum of Bank Annuities than could otherwise have been purchased from their *laches* in making the investment, and the depreciation of the funds during the interim (a).

28. **Trustee not chargeable with imaginary values.** — A defaulting trustee will not be charged with *imaginary values* (b); and being regarded as a mere stakeholder, he will not be liable for more than he has actually received (c), except in cases of very supine negligence, or wilful default (d).

[29. **Liable for value of new allotted shares.** — Where a trustee neglected to get in certain gas shares which formed part of the trust estate, and certain new shares were allotted in respect of the old gas shares, and were taken up by the

(c) *Clough v. Bond*, 3 M. & Cr. 496.

(d) *Wiles v. Gresham*, 2 Drew. 258; see p. 271.

(a) *Dimes v. Scott*, 4 Russ. 195; and see *Fletcher v. Green*, 33 Beav. 426.

(b) *Palmer v. Jones*, 1 Vern. 144.

(c) *Harnard v. Webster*, Sel. Ch. Ca. 53.

(d) *Pybus v. Smith*, 1 Ves. jun. 193, *per* Lord Thurlow; *Palmer v. Jones*, 1 Vern. 144, *per* Lord Nottingham.

person who had been allowed to hold the original shares, it was held that the trustee must make good the value of the new shares, less the amount of calls paid upon them, for they were an accretion to and, as such, part of the trust (e).

30. **Insufficient security.** — If trust money be advanced on an insufficient security, the Court will not in an action instituted by one trustee against his co-trustees in the absence of the *cestuis que trust*, order the securities to be realised merely to ascertain the deficiency, for the *cestuis que trust* may prefer either to retain the securities or proceed to a foreclosure, and they cannot in their absence be deprived of their rights (f).]

31. **Co-trustees guilty of breach of trust are severally responsible for the whole loss.** — Where *co-trustees* are *jointly* implicated in a breach of trust, the *cestui que trust*, though he obtains a decree against the trustees jointly, may have process of execution against any one of them separately (g); for as regards the remedy of the *cestui que trust* there is no *primary* liability, but each trustee is responsible for the entirety of the loss incurred (h). However, where the trustees are *in pari delicto* the decree is usually *enforced* against the trustees equally (i); and in one case, where a trustee had refused to accept \*the office [\*909] unless another should be named with him, and the trust money be divided between them, so that each might be responsible for a moiety only, and this was accordingly done, but the trust deed was drawn in the usual form as if they were joint trustees of the whole sum, it was held, upon the insolvency of one of the trustees, that the co-trustee should not be answerable for more than the moiety paid to himself,

[(e) *Briggs v. Massey*, 50 L. J. N. S. 747; varied on app. 51 L. J. N. S. 447.]

[(f) *Butler v. Butler*, 5 Ch. D. 554; 7 Ch. D. 116.]

(g) *Ex parte Shakeshaft*, 3 B. C. C. 197; *Walker v. Symonds*, 3 Sw. 74, 75; *Attorney-General v. Wilson*, Cr. & Ph. 28, *per* Lord Cottenham; *Taylor v. Tabrum*, 6 Sim. 281; *Fletcher v. Green*, 33 Beav. 426; and see *Ex*

*parte Angle*, Barn. 425; *Re Chertsey Market*, 6 Price, 278, 279; *Ex parte Norris*, 4 L. R. Ch. App. 280; [*Ex parte Craven*, W. N. 1885, p. 21.]

(h) See *Wilson v. Moore*, 1 M. & K. 146; *Lyse v. Kingdon*, 1 Coll. 188; *Richardson v. Jenkins*, 1 Drew. 477; *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 206; *Jenkins v. Robertson*, 1 Eq. Rep. 123.

(i) *Rehden v. Wesley*, 29 Beav. 215, *per* M. R.

the division of the trust money having been, Sir J. Leach observed, "a term in the creation of the trust" (a).

[32. **Joint judgment against partners no merger of separate liability.** — Where trust property is misappropriated by a firm so that the partners are jointly and severally liable to make good the loss, and the firm is adjudicated bankrupt on a judgment debt recovered against the firm by the owner of the trust property, the several liability of the partners is not, solely by reason of the creditor having recovered a joint judgment, merged in such judgment so as to preclude proof by the judgment creditor against the separate estates (b).]

33. **Liability for the costs of suit.** — Where the defendants are involved in a breach of trust, the Court decrees *costs* against them *jointly*, and does not distinguish between the relative culpabilities of the defendants (c). But where the plaintiff in pursuance of the decree recovered *all the costs* from a *single co-defendant*, the latter obtained an order in the same cause upon a motion (which however was not opposed) for contribution by the other defendants (d).

34. **Liability and contribution as between the trustees themselves, or between them and other parties.** — Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss, whether he was the principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or if he be dead, upon his estate; and this claim of the innocent trustee (though formerly only a simple contract debt as between himself and his co-trustee, even where the breach of trust was as between them and the *cestuis que trust* was a specialty debt), is now in such cases by the effect of the Mercantile Law Amendment Act (e) a specialty debt also (f). If all the trustees be

(a) *Birls v. Betty*, 6 Mad. 90.

(e) 19 & 20 Vict. c. 97.

[(b) *Re Davison*, 13 Q. B. D. 50.]

(f) *Lockhart v. Reilly*, 1 De G.

(c) *Lawrence v. Bowle*, 2 Ph. 140;

& J. 464; *Priestman v. Tyndall*, 24

1 C. P. Coop. t. Cott. 241.

Beav. 244.

(d) *Pitt v. Bonner*, 1 Y. & C. C. C.

equally guilty, then (unless the transaction was vitiated by not only constructive but such actual fraud, that the Court will hold itself entirely aloof (*g*),) an \**apportionment* or *contribution* amongst the trustees may be compelled, which under the old practice was not allowed, in the same suit, but on a bill filed for the purpose (*a*). And if in the suit for recovery of the trust fund any benefit, as a legacy, be coming in the same matter to one of two defaulting trustees, the other trustee, if he pay the whole of what is due to the *cestuis que trust*, will have a *lien* on the legacy of the co-trustee for the amount of contribution he ought to pay (*b*).

[35. One of the trustees gaining by breach not primarily liable. — If a breach of trust be committed from which one of the trustees derives indirectly a personal benefit, the other trustees who were parties to the breach have no equity against the trustee deriving the benefit to make him primarily liable for the breach (*c*). An executor who has been decreed to make good the loss incurred by his wilful default in not getting in part of the assets from the trustee of a settlement who has been allowed to retain and misappropriate them, is not thereby precluded from subsequently recovering from the trustee the amount misappropriated by him.<sup>1</sup>]

(*g*) See *Lingard v. Bromley*, 1 V. & B. 114; *Tarleton v. Hornby*, 1 Y. & C. 336; *Attorney-General v. Wilson*, Cr. & Ph. 28.

(*a*) *Fletcher v. Green* (No. 2), 33 Beav. 513; *Attorney-General v. Dallgars*, 33 Beav. 624, *per Cur.*; *Coppard v. Allen*, 2 De G. J. & S. 177, *per L. J. Turner*; *Ex parte Shakeshaft*, 3 B. C. C. 198, *per Lord Thurlow*; *Lingard v. Bromley*, 1 V. & B. 114; *Perry v. Knott*, 4 Beav. 180, *per Lord Langdale*; and see *Knatchbull v. Fearnhead*, 3 M. & Cr. 122; *Pitt v. Bonner*, 1 Y. & C. C. C. 670; *Ex parte Burton*, 3 M. D. & De G. 373; *Baynard v. Woolley*, 20 Beav. 583; *Jesse v. Bennett*, 6 De G. M. & G. 609; and see

*Wilson v. Goodman*, 4 Hare, 54; *Paull v. Mortimer*, W. N. 1873, p. 199; *Keogh v. Keogh*, 8 I. R. Eq. 179. But see now 36 & 37 Vict. c. 66, s. 24, subs. 3, and the 48th and following rules, and rule 55 of the 16th Order of the Rules of the Supreme Court, 1883; [and *Butler v. Butler*, 14 Ch. D. 329; and *Sawyer v. Sawyer*, W. N. 1883, p. 212; where an enquiry was directed how and in what proportions as between the trustees the sum to be paid to the plaintiffs should be borne and paid.]

(*b*) *Birks v. Micklethwait*, 33 Beav. 409.

[(*c*) *Butler v. Butler*, 5 Ch. D. 554; 7 Ch. D. 116.]

<sup>1</sup> *Scotney v. Lomer*, 29 Ch. D. 535.



36. **The gainer by the breach of trust is ultimately liable.**—As between the trustees and a *third* person who has *reaped the benefit* of the breach of trust, though the trustees must make the disbursement in the first instance to the injured party, the loss will eventually be cast on the person who was the gainer by the breach of trust (*d*). But the circumstance that the breach of trust was committed at the instance of a *cestui que trust* will not *per se* impose upon him the obligation of indemnifying the trustee generally. Thus in *Raby v. Ridehalgh* (*e*), where the *cestuis que trust*, the tenants for life, had instigated the breach of trust, L. J. Turner asked, “Has the Court in a suit of this nature ever gone the length of ordering the *cestuis que trust* personally to recoup the trustee?” and the Court directed the tenants for [\*911] life to account \* to the trustee only for the *monies which had been received* by them under the breach of trust, and this has since been followed by other decisions (*a*).

37. **The interest of parties committing a breach of trust may be stopped to compensate the trust.**—If a *cestui que trust* whether tenant for life, or other person having a partial interest, be responsible for having joined in a breach of trust, all the benefit that would have accrued to him, either directly or derivatively (*b*), either from that trust fund, or any other estate comprised in the same settlement (*c*), may be stopped by the *cestuis que trust*, or other person having a similar

(*d*) *Trafford v. Boehm*, 3 Atk. 440; *Greenwood v. Wakeford*, 1 Beav. 580; *Booth v. Booth*, 1 Beav. 125; *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; S. C. 2 Mer. 3; *Birks v. Micklethwait*, 33 Beav. 409; and see *Howe v. Earl of Dartmouth*, 7 Ves. 150, 151; *Jacob v. Lucas*, 1 Beav. 436; *Lincoln v. Wright*, 4 Beav. 432; *Tickner v. Old*, 18 L. R. Eq. 422; *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Hobday v. Peters* (No. 2), 28 Beav. 354; *Fetherstone v. West*, 6 I. R. Eq. 86.

(*e*) 7 De G. M. & G. 108.

(*a*) *Brown v. Maunsell*, 5 Ir. Ch.

Rep. 351; *Bently v. Robinson*, 9 Ir. Ch. Rep. 479; and see *Walsham v. Stainton*, 1 H. & M. 337; [*Butler v. Butler*, 5 Ch. D. 554; 7 Ch. D. 116.]

(*b*) *Jacobs v. Rylance*, 17 L. R. Eq. 341.

(*c*) *Woodyatt v. Gresley*, 8 Sim. 183; *Ex parte Mitford*, 1 B. C. C. 398; see *Priddy v. Rose*, 3 Mer. 105; *Burridge v. Row*, 1 Y. & C. C. C. 183, 583; *Lincoln v. Wright*, 4 Beav. 432, *per* Lord Langdale; *Fuller v. Knight*, 6 Beav. 205; *McGachen v. Dew*, 15 Beav. 84; *Vaughton v. Noble*, 30 Beav. 34.

equity, as against him, his assignees in bankruptcy (*d*), or judgment creditors (*e*), or general creditors (*f*); and (except so far as the defence of purchase for value without notice may be applicable) against *all* who claim under him (*g*), until the amount impounded, with the accumulations thereon (*h*), has compensated the trust estate for the loss for which that *cestui que trust* is responsible. [And even an estate *legally* vested in the wrongdoer by the settlement (being an instrument *inter vivos*) may by virtue of an implied contract be made available for repairing the breach of trust (*i*), but the doctrine cannot be extended to a *legal* devisee as there no contract can be implied, and in the absence of contract a Court of equity has no control over the estate (*j*).] And the rule applies to a *feme covert* entitled to her separate use [with no restraint on anticipation, if she had full knowledge of all the circumstances and acted independently in the transactions which constituted the breach of trust, but she will not be held liable merely because she acquiesced in or approved of the breach trust unless she took part in it (*k*); and she will not be liable] where her power of anticipation is restrained (*l*); and if the *cestui que trust* be one of three trustees and joined with the \*co-trustees in a breach of trust, and [\*912] the co-trustees have been made to repair the breach of trust, the co-trustees have a lien on the share of the *cestui que trust*, who is also a trustee, for a contribution of one-third, but without interest, towards the amount paid by them for clearing the joint breach of trust (*a*). It was contended in one case, that where an estate was *devised* to a person who

(*d*) *Ex parte* Turpin, 1 D. & C. 120; *Ex parte* Smith, 1 Deac. 143; *Ex parte* King, 2 M. & A. 410; *Prime v. Savell*, W. N. 1867, p. 227; *Jacubs v. Ryland*, 17 L. R. Eq. 341; see *Smith v. Smith*, 1 Y. & C. 338; *Burridge v. Row*, 1 Y. & C. C. C. 183, 583; [*Corr v. Corr*, 3 L. R. Ir. 435.]

(*e*) *Kilworth v. Mountcashell*, 15 Ir. Ch. Rep. 565.

(*f*) *Williams v. Allen* (No. 2), 32 Beav. 650.

(*g*) *Woodyatt v. Gresley*, 8 Sim. 180; *Priddy v. Rose*, 3 Mer. 86; *Cole*

*v. Muddle*, 10 Hare, 186; and see *Morris v. Livie*, 1 Y. & C. C. C. 380.

(*h*) *Ex parte* King, 2 M. & A. 410.

[(*i*) *Woodyatt v. Gresley*, 8 Sim. 180.]

[(*j*) *Egbert v. Butter*, 21 Beav. 560; *Fox v. Buckley*, 3 Ch. D. 508; and see *Ex parte* Barff, De Gex, 613.]

[(*k*) *Sawyer v. Sawyer*, 28 Ch. D. 595; and see *ante*, p. 768.]

(*l*) See pp. 750, 787, *supra*.

(*a*) *Prime v. Savell*, W. N. 1867, p. 227.

was a *debtor to the testator*, the debt was a *lien on the devised estate*, but the Court not finding any precedent did not allow the claim (*b*).

38. **Bankruptcy of the trustee.**—If the trustee become bankrupt,<sup>1</sup> the loss may be proved against his estate (*c*), and without proceeding in equity to establish the breach of trust (*d*), and if interest would have been decreed in equity against the trustee himself, it will constitute part of the debt in the proof against his estate in the hands of his trustee in bankruptcy (*e*), and if the breach of trust was a *sale of stock*, the *cestui que trust* may, at his option, prove for the proceeds of the sale, or for the value of the stock at the date of the bankruptcy (*f*), and if the bankrupt be a debtor to the trust, and entitled himself to a *reversionary* interest in the debt, the trustee may nevertheless prove for the whole debt, without any set-off for the reversionary interest (*g*). And if a trustee prove for the whole debt he may still retain any beneficial interest of the bankrupt in the trust estate by way of lien or set-off in further discharge of the debt (*h*). [for the trustee cannot be allowed by an act of this kind to prejudice the *cestuis que trust* (*i*).] But if an executor who

(*b*) *Ex parte* Barff, De Gex, 613.

(*c*) *Keble v. Thompson*, 3 B. C. C. 112; *Moons v. De Bernales*, 1 Russ. 301; *Dornford v. Dornford*, 12 Ves. 127; *Ex parte* Shakeshaft, 3 B. C. C. 197; *Bick v. Motley*, 2 M. & K. 312; *Lincoln v. Wright*, 4 Beav. 427; [46 & 47 Vict. c. 52, s. 37.]

(*d*) *Ex parte* Norris, 4 L. R. Ch. App. 280.

(*e*) *Dornford v. Dornford*, 12 Ves. 127; *Bick v. Motley*, 2 M. & K. 312; *Moons v. De Bernales*, 1 Russ. 301.

(*f*) *Ex parte* Shakeshaft, 3 B. C. C. 197; *Ex parte* Gurner, 1 M. D. & De G. 497; and see *Ex parte* Moody, 2 Rose, 413; *Ex parte* Stutely, 1 M. D. & De G. 643.

(*g*) *Ex parte* Stone, 8 L. R. Ch. App. 914.

(*h*) *Ex parte* Dicken, Buck, 115.

(*i*) *Per* Lord Chelmsford, L. C., *Stammers v. Elliott*, 3 L. R. Ch. App. 200.]

<sup>1</sup> A bankrupt may be a trustee; *Blin v. Pierce*, 20 Vt. 25; *Butler v. Ins. Co.*, 14 Ala. 798; *Wilhelm v. Folmer*, 6 Barr, 296. Insolvency or bankruptcy of the trustee does not disqualify him; *Shryock v. Waggoner*, 28 Pa. St. 430; *Belknap v. Belknap*, 5 Allen, 468. Trust property vested in a bankrupt does not pass to his assignee; *Blin v. Pierce*, 20 Vt. 25; *Lounsbury v. Purdy*, 11 Barb. 490; *Kip v. Bank*, 10 Johns. 63; *Ludwig v. Highley*, 5 Barr, 132. The trustee merely holds the legal estate for the benefit of the *cestui que trust*, and it is not affected by any embarrassments or liabilities of the trustee, and so is not affected by the bankruptcy of the trustee; *Porter v. Bank*, 19 Vt. 410; *Beaver v. Filson*, 8 Barr, 327.

represents the absolute ownership of the personal estate prove for the whole debt, it is deemed a waiver of any lien which the executor might otherwise have had upon the bankrupt's interest in such personal estate (*j*), and if the bankrupt, in whose hands the trust fund was, be one of the trustees, and indebted to the trust estate, and also have a *present* beneficial interest in the trust, proof cannot be made for the whole amount, but only for the balance, after setting off the bankrupt's beneficial interest against the debt due from him (*k*).

[\* 39. **Where one trustee a bankrupt but balance due** [\*913] **to the trustees on the accounts.** — If one of two trustees becomes bankrupt and is a debtor to the trust estate, and a balance is found due to the two trustees in taking their accounts, the balance will not be set off against the debt of the bankrupt trustee to the prejudice of the solvent trustee, but an account will be directed, so as to ascertain how much of the balance is due to the solvent trustee and how much to the bankrupt trustee, and the set-off will be confined to the latter account (*a*).]

40. **Trustee a partner and lending the trust money to the firm with notice.** — If the trustee was *one of a bankrupt firm*, to which the trust money had been lent, proof may be made either against the *joint estate* of the firm, or the *separate estate* of the bankrupt trustee, and of any other of the partners who may have constituted themselves trustees or taken an active part in the breach of trust (*b*); but not against both the joint and separate estates (*c*), and if the bankrupt had laid out the trust money on a mortgage, the *cestui que trust* is not put to his election whether he will prove for the debt, and abandon the mortgage, or take the mortgage and abandon the debt, but may prove for the debt, and have the

(*j*) *Stammers v. Elliott*, 3 L. R. Ch. App. 195.

(*k*) *Ex parte Turner*, 2 De G. M. & G. 927; *Ex parte Bishop*, 8 L. R. Ch. App. 768.

[(*a*) *McEwan v. Crombie*, 25 Ch. D. 175.]

(*b*) *Ex parte Heaton*, Buck, 386;

*Ex parte Watson*, 2 V. & B. 414; *Smith v. Jameson*, 5 T. R. 601; *Ex parte Bolland*, 1 Mont. & Mac. 315; *Ex parte Poulson*, De Gex, 79; *Ex parte Barnewall*, 6 De G. M. & G. 801.

(*c*) *Ex parte Barnewall*, 6 De G. M. & G. 795.

benefit of the mortgage also (*d*): and if the trust money had been invested, but improperly, the *cestui que trust* has a right to elect to prove for the money and interest, or for the value of the securities and profits (*e*).

**41. Trustee not a partner and lending money to the firm or the partners.** — If the trustee was *not one of the firm*, but he lent the trust fund to the bankrupt *firm*, proof can be made as for an ordinary debt against the joint estate. If the trustee lent the money, not to the firm, but to *one of the members* of the firm, and the partners had *no notice* of the source from which it came, proof can only be made against the separate estate of the partner who received, though the money may, in fact, have been applied to partnership purposes (*f*). But if the other partners had notice of the source of the money, proof can be made against the joint estate of the firm (*g*), but not, it seems, against the separate estate of each partner (*h*), unless the firm by their dealings with the *cestuis que trust* constituted themselves trustees

*directly* for them (*i*). Nor can proof be made on [\*914] \* the mere ground of *notice* for the *profits* made by the *use* of the money, for the partners in the firm are regarded not as *actual* but only as *constructive* trustees, that is, having notice of the trust they are accountable for the money, but not being clothed with any special duty, they do not come within the rule that “a trustee shall not profit by his trust” (*a*).

**42. Apportionment between tenant for life and remaindermen of amount recovered from bankrupt trustee.** — It was held by Lord Romilly, M. R., that where a trustee had proved against a bankrupt's estate for 6985*l.* 19*s.* 7*d.* *principal* money made

(*d*) *Ex parte* Biddulph, 3 De G. & Sm. 587; *Ex parte* Geaves, 8 De G. M. & G. 291; 25 L. J. N. S. Bank. 53.

(*e*) *Re* Montefiore, 9 Jur. 562.

(*f*) *Ex parte* Apsey, 3 B. C. C. 265; *Ex parte* Wheatley, Cooke's Bankrupt Law, 534, 8th ed.

(*g*) *Ex parte* Peele, 6 Ves. 602; *Ex parte* Clowes, 2 B. C. C. 595; and see *Ex parte* Burton, 3 M. D. & De G.

364; *Ex parte* Bolland, 1 Mont. & Mac. 315.

(*h*) *Ex parte* Beilby, 1 Gl. & J. 167; and see *Ex parte* Burton, 3 M. D. & De G. 364; *Ex parte* Woodin, 3 M. D. & De G. 399.

(*i*) *Ex parte* Woodin, 3 M. D. & De G. 399.

(*a*) *Stroud v. Gwyer*, 28 Beav. 130; see 141; and see *Ex parte* Burton, 3 M. D. & De G. 364.

away with by the bankrupt, and for 2744*l.* 9*s.* 11*d.* interest (which should have been paid to the tenant for life), making together a sum total of 9730*l.* 9*s.* 6*d.*, all dividends received under the bankruptcy should first make up the lost capital, and that the tenant for life had no lien for his lost income, but was entitled only to the interest of the capital sums received by way of dividend under the bankruptcy (*b*). The natural course would have been to apportion the fund as between the tenant for life and remaindermen according to their respective losses, as otherwise it would work occasionally a great hardship. Suppose for instance the tenant for life, though entitled for the last ten years, had received nothing and then died before the dividend was paid. The whole would go to the remainderman, and the executor of the tenant for life would receive nothing, though a large part of the dividend was recovered in respect of the life estate (*c*).

Since these remarks were written, the case has in effect been overruled. In *Cox v. Cox* (*d*), A. covenanted on his marriage that his executors, within three months after his death should pay to the trustees a sum of 6000*l.* with interest, from his death, at 4 per cent., to be held in trust for his widow for life, with remainder to the children. A. died in 1862, and his estate was administered by the Court. The assets were insufficient to satisfy the principal and interest, and the question was, how the amount recovered was to be dealt with as between the tenant for life and the remaindermen, and V. C. Sir W. James said, "The true principle in all these cases is, that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers from the default of the obligor. Assuming that 5500*l.* is the sum that will be recovered, a calculation must be made back. \* What [\*915] principal, if invested on the day of the obligor's

(*b*) *Re Grabowski's Settlement*, 6 L. R. Eq. 12.

(*c*) See *Innes v. Mitchell*, 1 Ph.

710, and *Turner v. Newport*, 2 Ph. 14, which were not cited to M. R.

(*d*) 8 L. R. Eq. 343; and see *Re Tinkler's Estate*, 20 L. R. Eq. 450.

death (the date from which interest was to run) at 4 per cent. would amount with interest to the sum so recovered? Interest at 4 per cent. on this principal, or in other words the difference between the principal and the amount will then go to the tenant for life, and the rest must be treated as principal."

[Of proceeds of sale of mortgaged property.—So where money had been properly invested upon mortgage, but the interest fell into arrear and the mortgaged property was ultimately realised, and the proceeds were insufficient to pay the principal and interest, it was held that the proceeds were apportionable between capital and income in the ratios of the capital sum originally invested and the actual arrears of simple interest on the mortgage (a).]

43. **How far trust debt barred by the bankrupt's certificate.**—The original trust debt was formerly barred by the certificate of the bankrupt, though no proof was made, and the *cestui que trust* did not know of the misapplication of the trust fund (b). But it was the duty of the trustee to see that *some person* proved on behalf of the trust, and if he did not, he was liable in equity for this neglect of duty: and though he had obtained his certificate he was held responsible personally for the amount that might have been received by way of dividend (c). And a demand in respect of a breach of trust was held to be equally barred by the trustee's discharge under the Insolvent Acts, provided the liability was duly mentioned in the schedule (d).

44. **Proof where one of several trustees is bankrupt.**—If the bankrupt was one of two *co-trustees*, who were jointly implicated in a breach of trust, then proof may be made against the bankrupt's estate for the whole money lost, though he was not the party benefited by the breach of trust (e); and though the other trustee be living and solvent (f). And the proof against the bankrupt will not be

[(a) *Re Moore*, 54 L. J. N. S. Ch. 432.]

(b) *Ex parte Holt*, 1 Deac. 248.

(c) *Orrett v. Corser*, 21 Beav. 52; and see *Woodhouse v. Woodhouse*, 8 L. R. Eq. 521.

(d) *Thompson v. Finch*, 22 Beav. 316; on appeal, 8 De G. M. & G. 560.

(e) *Ex parte Shakeshaft*, 3 B. C. C. 197.

(f) *Ex parte Beilby*, 1 Gl. & J. 167.

precluded by a *bond* given not to sue the other trustee, reserving the right against all other parties (*g*), though a *release* to the other trustee, being an extinguishment of the debt, would prevent any subsequent proof (*h*).

45. **Co-trustees bankrupts.** — So if two co-trustees be bankrupts, proof may be made against the estate of each (*i*); but of course more than 20s. in the pound cannot be received in the whole; or, at the same time that \* proof [\*916] is made against the estate of one who is a bankrupt, legal proceedings may be taken against the solvent trustee; for *proof* under a bankruptcy is not *payment* (*a*).

46. **Contribution.** — But where the whole debt is proved against the estate of the bankrupt trustee, the trustee in bankruptcy may afterwards take proceedings, and compel contribution from the other trustee (*b*), even where the bankrupt trustee himself could not, from his fraudulent conduct, have obtained such relief (*c*).

47. **Trust money authorised to be employed in trade.** — Where a testator has *authorised the employment of his estate in trade*, if the firm in which it was employed become bankrupt, proof cannot be made against the estate of the bankrupts in respect of the money so employed; for it is not a debt of the firm, but merely capital brought into it: but, when the joint creditors have been satisfied, the trustee member of the firm may, as one of the partners, establish a balance, if there be one, against the separate estates of the co-partners (*d*).

48. **32 & 33 Vict. c. 71.** — By the Bankruptcy Act, 1869 (*e*), a bankrupt after, and notwithstanding his order of discharge, remains liable to his *cestui que trust* for a breach of trust. But as the breach of trust constitutes a debt, which may be proved

(*g*) *Ib.*

(*h*) See *Blackwood v. Borrowes*, 2 Conn. & Laws. 478.

(*i*) *Keble v. Thompson*, 3 B. C. C. 112; *Ex parte Poulson*, De Gex, 79.

(*a*) *Ex parte King*, 1 Deac. 164, &c.

(*b*) See *Ex parte Shakeshaft*, 3 B. C. C. 197; *Lingard v. Bromley*, 1 V. & B. 114.

(*c*) See *Muckleston v. Brown*, 6 Ves. 68; *Joy v. Campbell*, 1 Sch. & Lef. 335, 339; *Ottley v. Browne*, 1 B. & B. 360.

(*d*) *Scott v. Izon*, 34 Beav. 434; and see *M'Neillie v. Acton*, 2 Eq. Rep. 21.

(*e*) 32 & 33 Vict. c. 71, s. 49.



for in the bankruptcy, the debtor is protected from all other proceedings against him for the breach of trust until after his discharge, when the creditor may proceed either against him personally or against his property, as if no bankruptcy had intervened (*f*). [The section applies to the breach of a constructive trust as well as that of an express trust (*g*).

**46 & 47 Vict. c. 52.** — By the Bankruptcy Act, 1883 (*h*), the liability of a bankrupt to his *cestui que trust* continues after his discharge only in cases where the breach of trust is fraudulent.]

**49. The Debtors' Act, 1869.** — The Debtors' Act, 1869 (*i*), abolishes arrest and imprisonment for debt, but excepts, amongst other things, default by a trustee or person acting in a fiduciary capacity (*j*), and ordered to pay [\*917] by a \* Court of equity (*a*) any sum *in his possession or under his control*. [A trustee who has once had trust funds in his possession is treated by a Court of equity as still having them in his possession until he has properly discharged himself, and it is not necessary, to bring a trustee within the exception, that he should have the trust funds in his actual possession, or under his control, at the time the order is made. Thus if an order be made upon a trustee to repay a sum which he had previously misappropriated and spent, he may be attached for neglecting to obey the order (*b*). So where two trustees, A. and B., received a sum of money and placed it in a bank to their joint account, but made payable to the cheque of A. alone, who drew it out and

(*f*) *Cobham v. Dalton*, 10 L. R. Ch. App. 655; [*Emma Silver Mining Company v. Grant*, 17 Ch. D. 122; *Cooper v. Prichard*, 11 Q. B. D. 351; and see *Nowell v. Nowell*, W. N. 1876, p. 248.]

(*g*) *Emma Silver Mining Company v. Grant*, 17 Ch. D. 122.]

(*h*) 46 & 47 Vict. c. 52, s. 30.]

(*i*) 32 & 33 Vict. c. 62, s. 4.

(*j*) The term "person acting in a fiduciary capacity" means a person standing in a fiduciary relation towards any other person, whether such other person is, or is not, the

plaintiff or one of the plaintiffs in the action in which the order for payment has been made; *Marris v. Ingram*, 13 Ch. D. 338.]

[(*a*) Under section 76 of the Judicature Act, 1873, the words "the High Court of Justice," should be read in substitution for the words "a Court of equity," *Marris v. Ingram*, 13 Ch. D. 338.]

[(*b*) *Middleton v. Chichester*, 6 L. R. Ch. App. 152; *Marris v. Ingram*, 13 Ch. D. 338; *Re Knowles, Doodson v. Turner*, 52 L. J. N. S. Ch. 685; 48 L. T. N. S. 760.]

misapplied it, and thereupon B. was ordered in a suit to make it good, it was held that B. on non-payment was liable to be attached and sent to prison (*c*).] But a trustee who had been ordered to pay a sum of money which he had *neglected* only in breach of his duty to recover, was held not to fall within the exception and could not therefore be arrested and imprisoned (*d*).

[50. **The Debtors' Act, 1878.** — By a subsequent Act (41 & 42 Vict. c. 54), the Court is empowered among other things “to enquire into the case of a defaulting trustee, and to grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process, or order of arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder.” Under this section the Court has refused to issue a writ of attachment against a defaulting trustee, where it appeared that he was unable to pay, and that no good purpose could be served by sending him to prison (*e*). But as the Debtors Act, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor was intended for the *punishment* of a fraudulent or dishonest debtor, and as it was not intended by the Amendment Act to get rid of the penal clauses of the previous Act, but only to give the judges a judicial discretion to deal with exceptional cases, the Court ought, in the case of a dishonest debtor, to send him to prison, unless it is satisfied that he has no means of satisfying the debt (*f*); and in a recent case in \* which the Court was not satisfied [\*918] that the debtor was unable to pay, Kay, J., observed, “I think that this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity even though he is unable to pay, and for the purpose of teaching other trustees the same lesson” (*a*). But where

[(*c*) *Evans v. Bear*, 10 L. R. Ch. App. 76.]

(*d*) *Ferguson v. Ferguson*, 10 L. R. Ch. App. 661.

[(*e*) *Street v. Hope*, 10 Ch. D.

286 n.; *Barrett v. Hammond*, 10 Ch. D. 285.]

[(*f*) *Marris v. Ingram*, 13 Ch. D. 338.]

[(*a*) *Re Knowles, Doodson v. Tur-*

there had been no actual fraud or embezzlement, but only an erroneous application of the trust funds, the Court upon the trustee undertaking to execute a charge upon all the property to which he was or might become entitled, declined to attach him for having failed to comply with an order for payment of the trust fund into Court (b).]

In assigning to the *cestui que trust* the foregoing remedies against the trustee, it must be understood that the *cestui que trust* has not himself *concurrent* in the breach of duty, or subsequently *acquiesced* in it, and, *à fortiori*, has not executed a formal *release* or *confirmation*.

### I. *Of concurrence.*

1. **Concurrence of the *cestui que trust* in the breach of trust.** — If a *cestui que trust* *concur* in the breach of trust he is for ever estopped from proceeding against the trustee for the consequences of the act (c), and *à fortiori* a *cestui que trust*, who is also a trustee, cannot hold his co-trustee responsible for any act in which they both joined (d).

2. **Ignorance.** — But persons cannot be held to have concurred in a breach of trust who had not the means of knowing that the acts to which they were parties involved a breach of trust (e).

3. **Femes covert and infants cannot concur.** — And persons cannot *concur* in a breach of trust, who, as *femes covert* (f)

ner, 52 L. J. N. S. Ch. 685; 48 L. T. N. S. 60.]

[(b) *Holroyde v. Garnett*, 20 Ch. D. 532.]

(c) *Brice v. Stokes*, 11 Ves. 319, and *Walker v. Symonds*, 3 Sw. 64, per Lord Eldon; *Wilkinson v. Parry*, 4 Russ. 272; *Cocker v. Quayle*, 1 R. & M. 535; *Nail v. Punter*, 5 Sim. 555; *Newman v. Jones*, Rep. t. Finch, 58; and see *Fellows v. Mitchell*, 1 P. W. 81; *Booth v. Booth*, 1 Beav. 125; *Langford v. Gascoyne*, 11 Ves. 336; *White v. White*, 5 Ves. 555; *Re Chertsey Market*, 6 Price, 280, 284; *Baker*

*v. Carter*, 1 Y. & C. 255; *Byrchall v. Bradford*, 6 Mad. 13; *Morley v. Lord Hawke*, cited in *Small v. Attwood*, 2 Y. & J. 520; *Fyler v. Fyler*, 3 Beav. 550; *Griffiths v. Porter*, 25 Beav. 236; *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 74; *Ex parte Barnewall*, 6 De G. M. & G. 801.

(d) *Butler v. Carter*, 5 L. R. Eq. 281, per Cur.

(e) *Buckeridge v. Glasse*, Cr. & Ph. 135, per Lord Cottenham.

(f) *Ryder v. Bickerton*, cited *Walker v. Symonds*, 3 Sw. 80; *Underwood v. Stevens*, 1 Mer. 717; *Smith v.*

and infants (*g*), have no legal capacity to consent to the transaction.

\*4. **Except guilty of actual fraud.**— But neither [\*919] coverture nor infancy will be a protection from a charge of *fraud*, and therefore if a *feme covert* (*a*), or infant (*b*), draw in a trustee to commit a breach of trust, such *feme covert* or infant cannot afterwards call the trustee to account for having violated his duty.

5. **Separate use.**— A *feme covert* will be bound by her concurrence in a breach of trust as to any fund which is settled to her *separate use*, where there is no *restraint against anticipation* (*c*), and such *feme covert*, if she execute a deed, will not be allowed to controvert the statements of facts contained in the deed (*d*). But she will not be estopped upon the ground of concurrence where the act was not voluntary, but her judgment was misled, or she was under undue influence (*e*). And a *feme covert* has no power to concur in any act as to a fund settled to her separate use where there is a *restraint against anticipation* (*f*).

**Power of appointment.**— And her concurrence will not

French, 2 Atk. 243; Needler's case, Hob. 225; Lench v. Lench, 10 Ves. 517, per Sir W. Grant; Lord Montford v. Lord Cadogan, 19 Ves. 639, 640, per Lord Eldon; and see Parkes v. White, 11 Ves. 221; Bateman v. Davis, 3 Mad. 98; Cresswell v. Dewell, 4 Giff. 460.

(*g*) See *supra*, pp. 37, 39; and Wilkinson v. Parry, 4 Russ. 276.

(*a*) Ryder v. Bickerton, cited Walker v. Symonds, 3 Sw. 82, per Lord Hardwicke; and see Savage v. Foster, 9 Mod. 35; Lord Montford v. Lord Cadogan, 19 Ves. 640; Vandebende v. Livingston, 3 Sw. 625; Evans v. Bicknell, 6 Ves. 181; Jones v. Kearney, 1 Dru. & War. 166; Davies v. Hodgson, 25 Beav. 187; Sharpe v. Foy, 4 L. R. Ch. App. 35; *Re Lush's Trusts*, 4 L. R. Ch. App. 591; Green v. Lyon, 21 W. R. 695, reversed on the facts, *Ib.* 830; Arnold v. Woodhams, 16 L. R. Eq. 33, per Cur.; [Ca-

hill v. Cahill, 8 App. Cas. 437; see S. C. *nom.* Cahill v. Martin, 5 L. R. Ir. 227; 7 L. R. Ir. 361.]

(*b*) See the cases at note (*h*) p. 39, *supra*.

(*c*) See *ante*, p. 759.

(*d*) Keays v. Lane, 3 I. R. Eq. 8, per Cur.

(*e*) Whistler v. Newman, 4 Ves. 129; Hughes v. Wells, 9 Hare, 773; and see Walker v. Shore, 19 Ves. 393.

(*f*) Cocker v. Quayle, 1 R. & M. 535; Walrond v. Walrond, Johns. 24; Leedham v. Chawner, 4 K. & J. 465; Clive v. Carew, 1 J. & H. 199; Pemberton v. McGill, 8 W. R. 290; Fletcher v. Green, 33 Beav. 426; Arnold v. Woodhams, 16 L. R. Eq. 29; [Stanley v. Stanley, 7 Ch. D. 589; Heath v. Wickham, 3 L. R. Ir. 376; 5 L. R. Ir. 285;] and see Wilton v. Hill, 25 L. J. N. S. Ch. 156; Derbishire v. Home, 3 De G. M. & G. 102, 113.

operate beyond the interest settled to her separate use, though she have a *power of appointment* in addition; as if a *feme* be tenant for life to her separate use, with a power of appointing the *corpus* by *will*, though her concurrence would affect the life interest, it does not prevent the appointees under the will from holding the trustees responsible (*g*). [But if the trustees are by reason of any engagement entered into by the *feme covert* entitled to be indemnified out of her estate it seems that under the principles established by the recent authorities, to be presently mentioned, the trustees could resort to the appointed fund as part of the *feme's* assets for their indemnity (*h*).

6. **Property subject to power becomes assets on exercise of power.**—The question whether property subject to a power of appointment in a married woman becomes, on her exercising the power, assets available for the satisfaction of her engagements has been \* the subject of conflicting opinions, and in *Johnson v. Gallagher* (*a*), was treated by Turner, L. J., as an open question on the authorities, though a distinction was drawn where the *feme covert* was guilty of fraud; and it was held by V. C. Kindersley, who on the general question was of opinion that the appointed funds were not assets (*b*), that] if an estate were settled to the separate use of a *feme covert* for life, with a general power of appointment by will, and in default of appointment to her in fee, and she suppressed her real name, and holding herself out as a *feme sole*, mortgaged the estate, the mortgagee had a *lien* upon the estate as against the heir or appointee (*c*). [The modern cases, however, seem to have established, independently of the provision in the Married

(*g*) *Kellaway v. Johnson*, 5 Beav. 319.

[(*h*) See *Williams v. Lomas*, 16 Beav. 1.]

[(*a*) 3 De G. F. & J. 494, 517; see *Norton v. Turvill*, 2 P. W. 144; *Heatley v. Thomas*, 15 Ves. 596; *Sockett v. Wray*, 4 B. C. C. 483; *Hughes v. Wells*, 9 Hare, 749; *Vaughan v. Vanderstegen*, 2 Drew. 165; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Hobday*

*v. Peters* (No. 2), 28 Beav. 354; *Shattock v. Shattock*, 2 L. R. Eq. 182; Sugd. on Powers, 8th ed. p. 476.]

[(*b*) *Vaughan v. Vanderstegen*, 2 Drew. 165; *Blatchford v. Woolley*, 2 Dr. & Sm. 204.]

(*c*) *Vaughan v. Vanderstegen*, 2 Drew. 363; and see *Hobday v. Peters* (No. 2), 28 Beav. 354; [*Barrow v. Manning*, W. N. 1878, p. 122.]

Women's Property Act, 1882, that the property becomes, on her exercising the power, assets for the payment of her debts as if it were her separate estate.

**Whether property bound by general engagements where power not executed.** — Thus in a recent case in the Privy Council] where there was no fraud, and the *feme covert* had a general power of appointment *either* by instrument *inter vivos* or by will, [which she exercised by will, it was] held that the general engagements of the wife were payable out of the property so settled (*d*), and the Court went so far as to say, in the broadest terms, that such a settlement amounts in effect to what in common sense and to common apprehension it would be, viz., an absolute gift to the sole and separate use, and that such a form of settlement on a married woman, without restraint of anticipation, vests in equity the entire *corpus* in her for all purposes as fully as a similar gift to a man would vest it in him (*e*). The actual decision of the case in which this general doctrine was laid down was clearly supportable on the ground that there had been an imperfect execution of the power, and there being valuable consideration equity would supply the defect; and the Court did not mean what the generality of the expressions would imply, that where the *power is not executed* the property is available for the *feme covert's* engagements, for the Court expressly approved the doctrine laid down by Sir G. Turner, that where there is a limitation over in default of \* appointment and the power has not been exercised, [\*921] the engagements of the married woman cannot prevail against the parties entitled in default of appointment (*a*). Nor did the Court *decide* even where the *power is executed* that the settled property will be available for payment of such general engagements as are merely verbal and not evidenced by any written instrument, or appear by any writing which is not an execution of the power at law, and would not be aided in equity for want of sufficient consideration.

(*d*) London Chartered Bank of Australia *v.* Lemprière, 4 L. R. P. C. 572, and see *Brewer v. Swirles*, 2 Sm. & G. 219.

(*e*) London Chartered Bank of Australia *v.* Lemprière, 4 L. R. P. C. 595.

(*a*) S. C. 592.

[7. However, in a later case, where personal property was settled upon such trusts as a *feme covert* should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (an event which happened) for her absolutely, and the *feme covert* appointed the property by will, the late M. R. held that the property was bound by the *feme covert's* general engagements, and he observed, "The true view seems to be this: that for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life, with power to dispose of it by deed or will, that is her separate property, so as to be subject to her general engagements" (b). It is conceived that this proposition in which no distinction is made between cases where the power is executed, and those in which it is not executed and there is a gift over in default of execution, cannot, consistently with the earlier authorities (c), be taken in its broadest sense, and the question to what extent the general engagements of a *feme covert* bind property settled upon her for life for her separate use with a general power of appointment by deed or will, and a gift over in default of appointment *where the power is not executed*, must still be considered as governed by the earlier authorities (d).

8. In a still later case, where the property was settled on a *feme covert* for life for her separate use with a general power of appointing by will, with a gift over in default of appointment, V. C. Hall held that the property appointed by her will was assets for the payment of her debts in the same manner as if it had belonged to her for her separate use (e), and this has since been acted upon (f).

9. Where a married woman was tenant for life for her

[(b) *Mayd v. Field*, 3 Ch. D. 587, 593; *Skinner v. Todd*, 51 L. J. N. S. Ch. 198.]

[(c) See *Johnson v. Gallagher*, 3 De G. F. & J. 494, and the cases there cited.]

[(d) See also *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206; Sugd. on Powers, 8th ed. pp. 475, 477.]

[(e) *Re Harvey's Estate*, 13 Ch. D. 216; see however the observations on this case by L. J. Cotton in *Pike v. Fitzgibbon*, 17 Ch. D. 466.]

[(f) *Hodgson v. Williamson*, 15 Ch. D. 87; *Hodges v. Hodges*, 20 Ch. D. 749.]

separate \* use without power of anticipation, and [\*922] the trustees were "at her direction to direct repairs and do all such acts as should be proper for that purpose," and the tenant for life herself ordered the repairs, the Court gave effect to the particular engagement out of the particular power to direct repairs and treated the power as being in effect exercised, and directed the trustees to raise the amount required for the repairs which had been executed, and to pay the amount to the builder employed by the tenant for life (a).

10. 45 & 46 Vict. c. 75, s. 4. — Now by the Married Women's Property Act, 1882 (b), sect. 4, it is provided, that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities, in the same manner as her separate estate is made liable under the Act.]

## II. *Of acquiescence.*<sup>1</sup>

1. **Acquiescence of cestui que trust.** — Again, a *cestui que trust*, though he did not *concur* at the time, may debar himself from relief by having *acquiesced* (c) in the breach of trust subsequently (d).

2. **Whether mere knowledge and abstinence from suing a bar in cases of breach of trust.** — How far the *mere knowledge* of a right to sue in respect of a breach of trust, and the abstain-

[(a) *Skinner v. Todd*, 51 L. J. N. S. 198.]

[(b) 45 & 46 Vict. c. 75.]

[(c) As to the meaning of acquiescence, see pp. 873, 874, *supra*.]

(d) *Harden v. Parsons*, 1 Eden, 145; *Thompson v. Finch*, 22 Beav. 324, *per M. R.*; *Griffiths v. Porter*, 25 Beav. 241, *per M. R.*; *Walker v. Symonds*, 3 Sw. 64, *per Lord Eldon*; *Hope v. Liddell*, 21 Beav. 183; *Brice*

*v. Stokes*, 11 Ves. 326; *Macdonnell v. Harding*, 7 Sim. 190; *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16; *Lincoln v. Wright*, 4 Beav. 432; *Blackwood v. Borrowes*, 2 Conn. & Laws. 459; *Farrant v. Blanchford*, 1 De G. J. & S. 107; *Rutherford v. Maziere*, 13 Ir. Ch. Rep. 204; *Stevens v. Robertson*, 37 L. J. N. S. Ch. 499; *Sleeman v. Wilson*, 13 L. R. Eq. 36; *Philips v. Pennefather*, 8 I. R. Eq. 474.

<sup>1</sup> Acquiescence may prevent a *cestui que trust* from obtaining relief; *Villines v. Norfleet*, 2 Dev. Eq. 167; but there can be no technical acquiescence unless the *cestui que trust* actually knows of the breach; *Beeson v. Beeson*, 9 Barr, 300; *Prevost v. Gratz*, 6 Wheat. 487; and has possession of all the facts; *Briers v. Hackney*, 6 Ga. 419; *Shartel's App.* 64 Pa. St. 25; *Maul v. Rider*, 51 Pa. St. 377. The *cestui que trust* should have suitable advisors, especially if



ing to sue will, without any other act, constitute *laches* in the eye of a Court of equity, and disentitle the plaintiff to relief, as in the particular instances of purchases by trustees, &c., above referred to (*e*), was until lately very uncertain; but it seems to be now settled that gross *laches*, as for twenty years, will disentitle a *cestui que trust* to relief (*f*). But of course mere knowledge without suing for a few years, as for three years (*g*), [four years (*h*),] or ten years (*i*), will not destroy the right to impeach the transaction. And [\*923] where there is an express trust for *\*successive incumbancers*, on a limited interest, as a life estate, the subsequent incumbancers are not chargeable with *laches* so long as the whole beneficial interest is absorbed by the prior incumbancers (*a*).

3. **No bar where notice of breach of trust is constructive only.**—A *cestui que trust*, who does not actually know, is not to be affected with knowledge of a breach of trust because he *might by enquiry have ascertained the fact*, for it is not *his* duty but that of the trustee to see that the trust fund is in a proper state (*b*).

4. **Ward of Court.**—A settlement by a ward of Court under the direction of the Court, of funds stated to represent the *infant's fortune*, will not operate as a confirmation of past breaches of trust (*c*).

(*e*) See p. 873, *supra*.

(*f*) *Bright v. Legerton* (No. 1), 29 Beav. 60; 2 G. F. & J. 606; *Hodgson v. Bibby*, 32 Beav. 221; and see *Browne v. Cross*, 14 Beav. 105; *Payne v. Evens*, 18 L. R. Eq. 356; *Re M'Kenna*, 13 Ir. Ch. Rep. 239; *Marquis of Clanricarde v. Henning*, 30 Beav. 175. But see *Knight v. Bowyer*, 2 De G. & J. 443; [*Thomson v. Eastwood*, 2 App. Cas. 215.]

(*g*) *Hanchett v. Briscoe*, 22 Beav. 496.

[(*h*) *Re Jackson*, 44 L. T. N. S.

467.]

(*i*) *Farrant v. Blanchford*, 11 W. R. 178; [*Re Cross*, 20 Ch. D. 109.]

(*a*) *Knight v. Bowyer*, 2 De G. & J. 421, see 443.

(*b*) *Thompson v. Finch*, 22 Beav. 325–327; 6 De G. M. & G. 560; *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 73.

(*c*) *Zambaco v. Cassavetti*, 11 L. R. Eq. 439.

he has but recently become *sui juris*; *Kirby v. Taylor*, 6 Johns. Ch. 242; *Williams v. Powell*, 1 Ired. Eq. 460; *Waller v. Armistead*, 2 Leigh, 11. Creditors may, on legal grounds, have their claims secured; *Iddings v. Bruen*, 4 Sandf. Ch. 223; but the *cestui que trust*, who is *sui juris*, is the only one who can concur or acquiesce in, or waive a breach of trust; *North Carolina R. R. Co. v. Wilson*, 81 N. C. 223; *Wilson v. Troup*, 2 Cow. 195.

5. **Fluctuating body as parishioners or creditors.** — It seems that a public and fluctuating body, as *parishioners*, may be bound by acquiescence (*d*). But it is almost unnecessary to repeat, that acquiescence cannot be objected against a class of persons, as parishioners or creditors, *with the same degree of force* as against a single individual (*e*).

6. **Satisfaction in part for a breach of trust.** — A *cestui que trust* who, knowing that his trustee has committed a breach of trust, gets what he can from the wreck of the property, and with that view receives from the trustee *part* of the relief to which he is entitled, does not thereby *waive his right to the full relief* to which he is entitled (*f*).

[7. **Creditor's right not affected by not pressing for payment.** — A creditor who merely abstains from calling upon the executors to realize the testator's estate for the purpose of paying his debt is not thereby deprived of his right to sue the executors for *devastavit*. To deprive him of his right, he must, either by his conduct or by express authority, have misled the executors into parting with the assets available for payment of his claim (*g*).]

8. **Acquiescence by reversioner.** — As to acquiescence by *cestui que trust* while his interest is *reversionary*, L. J. Turner observed: "Length of time, where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not distinct propositions. They constitute but one proposition, and that proposition is that *the cestui que trust assented to the breach of trust*. A *cestui que trust* \* whose interest is rever- [\*924] sionary is not bound to *assert his title* until it comes into possession; but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of his *assent to a breach of trust*. He is not, so

(*d*) See *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 92; *Re Chertsey Market*, 6 Price, 280, 284; *Edenborough v. Archbishop of Canterbury*, 2 Russ. 105, 108; *Attorney-General v. Scott*, 1 Ves. 415; *Attor-*

*ney-General v. Cuming*, 2 Y. & C. C. C. 150.

(*e*) See *supra*, pp. 498, 870.

(*f*) *Thompson v. Finch*, 22 Beav. 316; 8 De G. M. & G. 580; [*Re Cross*, 20 Ch. D. 109, 122.]

[(*g*) *Re Birch*, 27 Ch. D. 622.]

far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case" (a). But he afterwards added that he was not prepared to say that, where the trust was definite and clear, a breach of trust could be held to have been sanctioned or concerned in by the *mere knowledge and non-interference* of the *cestui que trust* before his interest had come into possession (b). The above doctrines were approved by L. C. Campbell, with the further remark that it was easy to conceive cases in which, from great lapse of time, the facts from which the consent of the *cestuis que trust* was to be inferred might and ought to be presumed (c).

### III. Of Release and Confirmation.

1. **Release and confirmation by cestui que trust.** — Lastly, a *cestui que trust* may preclude himself from his remedy against the trustee by executing a formal *release* of the breach of trust, or giving validity to the transaction by an express *confirmation* (d). And if the *cestui que trust* release the principal in a breach of trust or fraud, he cannot afterwards proceed against the other parties who would have been secondarily liable (e).

[**Release in respect of a void transaction invalid.** — But a release in respect of a transaction which a Court of equity would hold to be not merely voidable but *void*, will not bind the *cestui que trust* executing the release. Thus where on the footing of a supposed illegitimacy the title of the *cestui que trust* to a legacy was disputed and denied by the trustee, and the *cestui que trust* was thereby induced to accept from the trustee a smaller sum than that to which he was entitled, and

(a) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 72.

(b) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 74.

(c) *Ib.* 77; and see *Taylor v. Cartwright*, 14 L. R. Eq. 176.

(d) *Blackwood v. Borrowes*, 2 Conn. & Laws. 459; *French v. Hob-*

*son*, 9 Ves. 103; *Wilkinson v. Parry*, 4 Russ. 272; *Aylwin v. Bray*, cited in *Small v. Atwood*, 2 Y. & J. 517; *Cresswell v. Dewell*, 4 Giff. 465, *per Cur.*

(e) *Thompson v. Harrison*, 2 B. C. C. 164; see *Blackwood v. Borrowes*, 2 Conn. & Laws. 478.

by deed to release the trustee from the payment of the legacy, it was held, that the question of the legitimacy of the *cestui que trust* being entirely irrelevant, the transaction was absolutely unmeaning and void, and the release was set aside and relief granted after a long lapse of time (*f*).]

\* 2. **Waiver.** — Under the head of release, we may [\*925] notice the subject of *waiver*. “As to *waiver*,” said Sir W. Grant, “it is difficult to say precisely what is meant by that term. With reference to the legal effect, a *waiver* is nothing unless it amounts to a release. It is by a release, or something equivalent only, that an equitable demand can be given away. A mere *waiver* signifies nothing more than an expression of intention not to insist upon the right, which in *equity* will not without consideration bar the right any more than at *law* an accord without satisfaction would be a plea. If there be a consideration, however slight, I do not know that the Court would not consider it a sufficient foundation for a release, or what is equivalent to a release” (*a*).

It would seem, therefore, that waiver is some positive act which, if supported by valuable consideration, though slight, will be taken in equity to constitute a release; but, if it be merely an expression of intention not to insist on the right, and there is an absence of consideration, it is no waiver in the sense of a release (*b*).

**Requisites for valid acquiescence, release, or confirmation.** — Acquiescence, and release and confirmation, to have the effect we have mentioned, must be understood to be accompanied with the following conditions: —

*a.* As in the case of concurrence, the *cestui que trust* must be *sui juris*, and not a *feme covert* or infant; and, as regards infants, the Court continues its protection even after they have attained twenty-one till such time as they have acquired all proper information (*c*); and infants on coming of age

[(*f*) *Thomson v. Eastwood*, 2 App. Cas. 215.]

(*a*) *Stackhouse v. Barnston*, 10 Ves. 466.

(*b*) See *Farrant v. Blanchford*, 11 W. R. 178.

(*c*) See *Walker v. Symonds*, 3 Sw.

69; *Hicks v. Hicks*, 3 Atk. 274; *Osmond v. Fitzroy*, 3 P. W. 131; *Hylton v. Hylton*, 2 Ves. 547; *Kilbee v. Sneyd*, 2 Moll. 233; *March v. Russell*, 3 M. & Cr. 42, 44; *Bateman v. Davis*, 3 Mad. 98; *Wedderburn v. Wedderburn*, 2 Keen, 722, 4 M. & Cr. 41; *Kay*

must, in the case of a formal release being executed by them, *where it is required*, have *proper legal advice* (*d*). However, a *feme covert* is clearly *sui juris* as regards property settled to her *separate use*, [or belonging to her as her separate property under the Married Women's Property Acts,] where there is *no restraint against anticipation* (*e*). But where a *feme covert*

is entitled to separate estate *with a clause against* [\*926] *\* anticipation* it is difficult to see how she can be affected by acquiescence. In a late case (*a*), however, Lord Justice Turner intimated his leaning to be in favour of the affirmative; but the language of Lord Justice Knight Bruce, in the case alluded to, was more guarded. The restraint on anticipation can impose no fetter as respects *income accrued due before the acts of acquiescence* relied upon (*b*). If a suit be instituted for relief against a breach of trust, the *Court* has jurisdiction to *sanction a compromise* on behalf of a married woman even though her interest be *reversionary* (*c*).

β. The *cestui que trust* must be fully cognisant of all the facts and circumstances of the case (*d*).

*v. Smith*, 21 Beav. 522; *Aveline v. Melhuish*, 2 De G. J. & S. 288; *Chambers v. Crabbe*, 34 Beav. 457; *Sercombe v. Sanders*, 34 Beav. 382; *Kempson v. Ashbee*, 10 L. R. Ch. App. 15.

(*d*) *Lloyd v. Attwood*, 3 De G. & J. 615.

(*e*) See *ante*, 759; and *Jones v. Higgins*, 2 L. R. Eq. 538; *Taylor v. Cartwright*, 14 L. R. Eq. 175. The dictum of Lord Hardwicke in *Smith v. French*, 2 Atk. 245, and the view of Sir J. Romilly, M. R. in *Davies v. Hodgson*, 25 Beav. 187, are opposed to the current of authority.

(*a*) *Derbshire v. Home*, 3 De G. M. & G. 80; and see *Wilton v. Hill*, 25 L. J. N. S. Ch. 156; *Davies v. Hodgson*, 25 Beav. 186, 187; *Clive v. Carew*, 1 J. & H. 205; [*Heath v. Wickham*, 3 L. R. Ir. 376, 390, where the dictum of L. J. Turner was doubted.]

(*b*) *Rowley v. Unwin*, 2 K. & J. 138.

(*c*) *Wall v. Rogers*, 9 L. R. Eq. 58.

(*d*) *Adams v. Clifton*, 1 Russ. 297; *Walker v. Symonds*, 3 Sw. 1; *Randall v. Errington*, 10 Ves. 423; *Buckridge v. Glasse*, Cr. & Ph. 126; *Bennett v. Colley*, 2 M. & K. 232, *per* Lord Brougham; *Vyvyan v. Vyvyan*, 30 Beav. 65; *Eaves v. Hickson*, 30 Beav. 142; *Farrant v. Blanchford*, 11 W. R. 178, 1 De G. J. & S. 119; *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 74; *Strange v. Fooks*, 4 Giff. 408; and see *Earl of Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Roche v. O'Brien*, 1 B. & B. 330, and the cases there cited; *Bowes v. East London Water Works Company*, 3 Mad. 375; *McCarthy v. De-caix*, 2 R. & M. 615; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; *Munch v. Cockerell*, 9 Sim. 339; 5 M. & Cr. 179; *Broadhurst v. Balguy*, 1 Y. & C. C. C. 16; *Downes v. Bullock*, 25 Beav. 62; *Lloyd v. Attwood*, 3 De G. & J. 650.

γ. The *cestui que trust* must not only be acquainted with the *facts*, but also to a certain extent apprised of the *law*, or how those facts would be dealt with if brought before a Court of equity (*e*).

δ. The release must not be wrung from the *cestui que trust* by distress or terror (*f*).

## \*SECTION IV.

[\*927]

OF THE MODE AND EXTENT OF REDRESS IN BREACHES OF TRUST  
COMMITTED BY TRUSTEES OF CHARITIES.I. Of the *mode* of redress.<sup>1</sup>

1. **Ordinary mode of redress in breach of trust by charitable trustees.** — The regular and ordinary course of proceeding is by way of *information* (1) in the name of the Attorney-General, the Queen is *parens patriæ*, and it is the duty of the Crown officer, the Attorney-General, to see that justice

(*e*) *Cockerell v. Cholmeley*, 1 R. & M. 425, *per* Sir J. Leach; *McCarthy v. Decaix*, 2 R. & M. 615; *Marker v. Marker*, 9 Hare, 16; *Burrows v. Walls*, 5 De G. M. & G. 254; *Re Saxon Life Assurance Society*, 2 J. & H. 412; *Strange v. Fooks*, 4 Giff. 408; *Kempson v. Ashbee*, 10 L. R. Ch. App. 15;

but see *Stafford v. Stafford*, 1 De G. & J. 202, and the observations at p. 407, *supra*.

(*f*) *Bowles v. Stewart*, 1 Sch. & Lef. 209, *see* 220; and *see* *Earl of Chesterfield v. Janssen*, 2 Ves. 149, 158.

(1) Where the management of no charity *revenue* is concerned, as in a suit instituted by parishioners for the mere purpose of setting aside the nomination of a clerk to the bishop by the trustees of the advowson, the Attorney-General need not be a party; it is the simple case of *cestuis que trust* calling upon the trustees to exercise the legal right; and [under the old practice] the suit was not by information, but by bill: *see* *Attorney-General v. Parker*, 1 Ves. 43; *S. C.* 3 Atk. 576; *Attorney-General v. Forster*, 10 Ves. 335; *Attorney-General v. Newcombe*, 14 Ves. 1; *Davis v. Jenkins*, 3 V. & B. 151; *Inhabitants of Clapham v. Hewer*, 2 Vern. 387; *Attorney-General v. Cuming*, 2 Y. & C. C. C. 149.

<sup>1</sup> If a charitable trust is so treated by the trustees that they are guilty of a breach, the heirs or representatives are not the gainers; *Brown v. Baptist Society*, 9 R. I. 177; *Dublin Case*, 38 N. H. 459; *Hadley v. Hopkins*, Acad. 14 Pick. 241; *Dutch Church v. Mott*, 7 Paige, 77; *Sanderson v. White*, 18 Pick. 328.

Redress for a breach may be had by information or bill; *Parker v. May*, 5 Cush. 341; *Att'y Gen. v. Garrison*, 101 Mass. 223; by parties interested; *Att'y Gen. v. Meeting House*, 3 Gray, 1; *Att'y Gen. v. Man'fg Co.* 14 Gray, 586; *Brunnenmeyer v. Buhre*, 32 Ill. 183; but not in all cases; *Ibid*.

is administered to every part of her Majesty's subjects. *Relators* need not be personally interested (*a*). They are required merely because the Attorney-General, prosecuting a suit in the name of the Crown, would not be liable to costs, and unless some person were made responsible, proceedings might be instituted very oppressive to individuals (*b*).

2. **Statute of Charitable Uses.** — In the reign of Elizabeth an Act was passed, commonly called the *Statute of Charitable Uses* (*c*), by which the Court of Chancery was empowered to issue commissions to certain persons, including the bishop of the diocese, who were authorised, after summoning a jury of the county where the property was situate, to enquire into any abuse or misapplication of the trust estate. Many of these proceedings were so little consonant with justice, and on appeal to the Lord Chancellor, were found at once so puzzling, and so far from accomplishing the object in view, that at length the practice of issuing commissions fell into disuse, and people again resorted to the original process by way of information (*d*).

3. **52 Geo. 3. c. 101, called Romilly's Act.** — After commissions had ceased to be issued, the legislature endeavoured to provide a remedy, not as before, by creating a new [\*928] \*jurisdiction, but by giving liberty to proceed under the old jurisdiction of Chancery in a summary mode. The 52 Geo. 3, c. 101, commonly called *Sir Samuel Romilly's Act*, and intituled "An Act to provide a summary Remedy in Cases of Abuses of Trusts created for Charitable Purposes," declared that "in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a Court of equity should be deemed necessary for the administration of any trust for charitable purposes, it should be lawful for any two or more persons to present a *petition* to the Chancellor, Master of the Rolls, or the Court of Exchequer, praying such relief as the nature of the case might

(*a*) Attorney-General v. Vivian, 1 Russ. 226.

(*c*) 43 Eliz. c. 4.

(*b*) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. S. 48, per Lord Redesdale.

(*d*) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. S. 61, 62, per Lord Redesdale.

require, such petition to be heard in a summary way upon affidavits or such other evidence as should be produced, the order made thereon to be final and conclusive, unless appealed against to the House of Lords within two years from the entry thereof." And it was provided that "every petition should be signed by the persons preferring the same in the presence of and be attested by the *solicitor or attorney* concerned for the petitioners, and should be allowed by his Majesty's *Attorney or Solicitor-General*."

4. **Strictures on the Act.**—These enactments, though penned by a very able hand, have been strongly reprobated as very loosely and obscurely worded—as tending rather to increase than diminish the expense of the application—in short, as having produced more mischief than benefit. "It was a wise saying," observed Lord Redesdale, "that the farthest way about was often the nearest way home, and he believed that these summary proceedings would be not always the *nearest* or at least not the *best* way home" (a).

5. **Construction of the Act.**—Upon the construction of this statute the following points have been resolved:—

a. **Interest.**—Although the Act authorises *any* two or more persons to present the petition, the words must be understood to mean any persons *having an interest* (b): and the Court is bound to see not only that the petitioners are possessed of a clear interest, but that they prove themselves to be possessed of the interest they allege in their petition (c).

β. **Breach of trust.**—It has been said that the body of the statute is to be governed by the preamble, and therefore that the Act will not authorise a petition for any other purpose than relief against a breach of \*trust (a). [\*929] But this narrow construction gives no force to the words of the Act, "*or whenever the direction or order of a*

(a) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. S. 91, per Lord Eldon.

(b) *Re Bedford Charity*, 2 Sw. 518, per Lord Eldon.

(c) Corporation of Ludlow v. Greenhouse, 1 Bligh, N. S. 66, 67, 81, per Lord Redesdale; and see *Re Clarke's Charity*, 8 Sim. 42.



*Court of equity shall be deemed necessary for the administration of any trust for charitable purposes ;*" and the doctrine has since been called into question, and may be considered as overruled (*b*).

**γ. Plain and simple cases only within the Act.**—The provision extends only to *plain and simple* cases for the opinion or direction of the Court (*c*), not where a question is to be discussed adversely who are to be intrusted with the administration of the charity estate (*d*), or who are entitled to the benefit of it (*e*), or whether the trustees or governors of the charity have or not, by the constitution of it, a certain authority, as of removing a master (*f*), or where any stranger is interested (*g*) (for the right of a third person cannot be disposed of on petition (*h*)), or where the relief which is sought is directed against the *assets* of a deceased trustee (*i*), or where the object of the application is not to have the existing charity regulated, but to have the funds diverted to some other charitable purpose (*j*). The Court has jurisdiction, however, under the Act, to settle a scheme of the

(*b*) *Re Upton Warren*, 1 M. & K. 410; *Re Parke's Charity*, 12 Sim. 332; *Re Manchester New College*, 16 Beav. 610; *Re Hall's Charity*, 14 Beav. 115; and see *Re Slewringe's Charity*, 3 Mer. 707; *Ex parte Rees*, 3 V. & B. 12; *Re Clarke's Charity*, 8 Sim. 34; *Re Phillipott's Charity*, 8 Sim. 381; and cases in note to *Re Hall's Charity*, 14 Beav. 120.

(*c*) *Corporation of Ludlow v. Greenhouse*, 1 Mad. 92, reversed in D. P. 1 Bligh, N. S. 17, see 66, 81, 89; *Re Phillipott's Charity*, 8 Sim. 381; *Ex parte Brown*, G. Coop. 295; *Ex parte Skinner*, 2 Mer. 456, 457, *per* Lord Eldon; and see *Re Chertsey Market*, 6 Price, 277.

(*d*) *Re West Retford Church and Poor-lands*, 10 Sim. 101; *Re Phillipott's Charity*, 8 Sim. 381.

(*e*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 66; *Re Manchester New College*, 16 Beav. 610; *Re Clarke's Charity*, 8 Sim. 34.

(*f*) *Attorney-General v. Corporation of Bristol*, 14 Sim. 648; and see *Re Manchester New College*, 16 Beav. 610; *Attorney-General v. East Retford Grammar School*, 17 L. J. N. S. Ch. 450; but see *Re Fremington, School*, 10 Jur. 512; 11 Jur. 421; *Re Phillip's Charity*, 9 Jur. 959.

(*g*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 66; *per* Lord Redesdale; *Ex parte Rees*, 3 V. & B. 10; *Re Manchester New College*, 16 Beav. 610; but see *Re Upton Warren*, 1 M. & K. 410; [*Re Hospital for Incurables*, 13 L. R. Ir. 361, where the Court adjudicated on the conflicting claims of two charities arising under the same instrument.]

(*h*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 93, *per* Lord Eldon.

(*i*) *Ex parte Skinner*, Wils. 15, *per* Lord Eldon; *Re Saints Wenn's Charity*, 2 S. & S. 66.

(*j*) *Re Reading Dispensary*, 10 Sim. 118.

charity (*k*), or to alter a scheme previously settled by decree (*l*), or to appoint new trustees (*m*), or where parishes have been divided to apportion the \*chari- [\*930] ties amongst the districts (*a*), or to direct a sale of the charity estate in a proper case (*b*), and generally the Court, as between the trustees, and *cestuis que trust* of the charity, exercises a discretion as to whether it can put in operation the powers given by the Act with benefit to the charity (*c*).

**d. Allowance.**—The allowance “by the Attorney or Solicitor-General” must be construed with reference to the previous law upon the subject, and must therefore be taken to mean, not by the Attorney or Solicitor-General indifferently, but by the Attorney-General, when there is such an officer, and in the vacancy of that office by the Solicitor-General (*d*).

**e. Want of signature.**—If the petition be not signed by the Attorney-General or Solicitor-General, or if, after signature, it be not duly served, an order made by the Court under the Act will be an absolute nullity (*e*), and the petition may be taken off the file for irregularity (*f*).

**s. Caution in signature.**—As the intention of the legislature was to guard the charity fund from abuse, and with that view to prevent proceedings from being instituted, as they frequently were before, for no other reason than

(*k*) *Re* Royston Free Grammar School, 2 Beav. 228; *Re* Berkhamstead Free School, 2 V. & B. 134; *Re* Shrewsbury Grammar School, 1 Mac. & G. 324; 1 Hall & Tw. 401.

(*l*) *Attorney-General v. Bishop of Worcester*, 9 Hare, 328.

(*m*) *Bignold v. Springfield*, 7 Cl. & Fin. 71.

(*a*) *Re* West Ham Charities, 2 De G. & Sm. 218.

(*b*) *Re* Parke's Charity, 12 Sim. 329; *Re* Ashton Charity, 22 Beav. 288; *Re* Overseers of Ecclesall, 16 Beav. 297; and see *Re* Lyfford's Charity, *Ib.* note; *Re* Alderman Newton's Charity, 12 Jur. 1011 (the case of an exchange); *Re* Sowerby's

Charity, Jan. 26, 1849, before the V. C. of England (the case of a willing purchaser); *Suir Island Female Charity School*, 3 Jon. & Lat. 171. As to the jurisdiction of the Court generally to sell charity lands, see *supra*, p. 539.

(*c*) *Re* Manchester New College, 16 Beav. 610.

(*d*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 51, 52, 82, *per* Lord Redesdale; *Ex parte Skinner*, 2 Mer. 456, *per* Lord Eldon.

(*e*) *Attorney-General v. Green*, 1 J. & W. 305.

(*f*) *Re* Dovenby Hospital, 1 M. & Cr. 279.

because it was known that the costs would be paid out of the charity estate, the Attorney-General, or, in the vacancy of that office, the Solicitor-General, ought not to sanction the petition with his signature but upon as much deliberation as if the relief were sought by way of information (*g*).

**ζ. Attorney-General must be a party.**—The Attorney-General by his *allocatur*, or allowance, of the petition, is not *functus officio*, and precluded from all future control, but must be made a party to any subsequent proceedings under the petition, as he would have been to all proceedings by way of information (*h*).

**η. May correct his judgment.**—The Attorney-General [\*931] eral, as representing the person of the \* Queen in her character of *parens patriæ*, is bound to see justice done, not only to the plaintiff in the petition, but also to the trustees and other defendants, and therefore is not estopped by his *allocatur* of the petition from afterwards correcting his judgment, but may support or oppose the views of the petitioners, as in his discretion he may think fit (*a*).

**θ. Motion.**—When the *jurisdiction* of the Court has been once attracted by the petition, a subsequent order may be made upon motion without the expense of a further petition (*b*).

**6. Acts appointing Commissioners of enquiry.**—Under powers given by 58 Geo. 3, c. 91, and 59 Geo. 3, c. 81, certain *commissioners of enquiry into charities* were appointed, and by 59 Geo. 3, c. 91, it was enacted, that when it appeared to such commissioners of enquiry that the directions or orders of a Court of equity were requisite for remedying any *neglect, breach of trust, fraud, abuse, or misconduct* in the management of any trust created for charitable purposes, &c., it should be lawful for the said commissioners to certify the

(*g*) *Ex parte Skinner*, 2 Mer. 456, per Lord Eldon.

(*h*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 51, 65, 82, 83, per Lord Redesdale; *Attorney-General v. Stamford*, 1 Ph. 737; and see *Re Chertsey Market*, 6 Price, 271;

*Attorney-General v. Haberdashers' Company*, 15 Beav. 397.

(*a*) *Corporation of Ludlow v. Greenhouse*, 1 Bligh, N. S. 43–52.

(*b*) *Re Slewring's Charity*, 3 Mer. 707; *Ex parte Friendly Society*, 10 Ves. 287; *Re Chipping Sodbury School*, 5 Sim. 410.

particulars of such case to his Majesty's Attorney-General. The labours of these commissioners of enquiry proved very valuable, and many informations were filed in consequence of certificates made by them; but their powers, after being frequently continued, expired in 1837.

7. 16 & 17 Vict. c. 137.—By the *Charitable Trusts Act*, 1853, great additional facilities have been afforded for detecting and remedying breaches of trust in charity matters.

**Powers of enquiry.**—Commissioners are thereby appointed (*c*), to whom are confided powers of enquiry (*d*) similar to those given to the commissioners appointed by the Acts of George 3, and also a similar power of certifying cases to the Attorney-General as fit for his interference (*e*).

**New jurisdiction at chambers.**—In cases of charities the incomes of which exceed 30*l. per annum*, the same jurisdiction is given in charity cases (after the *previous sanction of the charity Commissioners*) to the Chancery Judges at *chambers* as was before the Act exercisable by the Court of Chancery, or the Lord Chancellor entrusted with the custody of lunatics, in a suit regularly constituted, or upon petition; but the Judge may direct a suit or petition to be instituted or presented (*f*). And the provisions of the Act in respect of charities whose incomes exceed 30*l. per annum*, are applicable to charities within the *city of London*, the income whereof is *less than 30l. per annum* (*g*).

**\* New jurisdiction of the Courts of Bankruptcy and [\*932] County Courts.**—Where the incomes of charities do *not exceed 30l.* (since extended to 50*l.* (*a*)) *per annum*, the *District Courts of Bankruptcy* and *County Courts*, with the *previous sanction of the Charity Commissioners*, are armed with the same jurisdiction as the Court of Chancery had (*b*); and with the permission of the Commissioners to be applied for within one month after the making of the order (*c*), an *appeal* was allowed to the Court of Chancery (*d*).

(*c*) 16 & 17 Vict. c. 137, s. 1.

(*d*) *Ib.* sects. 9 to 14.

(*e*) *Ib.* s. 20.

(*f*) *Ib.* s. 28.

(*g*) *Ib.* s. 30.

(*a*) 23 & 24 Vict. c. 136, s. 11.

(*b*) 16 & 17 Vict. c. 137, s. 32.

(*c*) *Ib.* s. 39.

(*d*) *Ib.* s. 40.

**Necessity for previous consent of Charity Commissioners before taking proceedings.** — The Act contains a special provision that no suit or proceeding (*e*) not being an application "*in any suit or matter actually pending*," shall be commenced or taken without an authority previously obtained from the Charity Commissioners (*f*). It was at first held that where money had been paid into Court under the Trustee Relief Act, 10 & 11 Vict. c. 96 (*g*), or under a Railway Act (*h*), no such suit or matter was pending as to obviate the necessity of previously obtaining the concurrence of the Charity Commissioners. But it has since been decided *by the Court of Appeal*, that in such cases the previous sanction of the Charity Commissioners is unnecessary. The object of the provision was merely to stop the enormous abuses in reference to proceedings in charity matters, and the words *suit or matter actually pending* mean pending at the time of the *application*, and not at the passing of the Act (*i*).

[(*e*) The words suit or other proceeding do not include an action at law. Thus, the sanction of the Charity Commissioners was held not to be requisite, where the Governors of an Endowed School commenced an action against the master to restrain him from presenting himself at the school, or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the Governors, *Holme v. Guy*, 5 Ch. D. 901. But they include a mandamus to compel the rendering of proper accounts; *Attorney-General v. Dean and Canons of Manchester*, 18 Ch. D. 596. As to what cases fall within the section, see *Brittain v. Overton*, 25 Ch. D. 41, n.; *Bentham v. Earl of Kilmorey*, 25 Ch. D. 39.]

[(*f*) But this provision does not apply to the Charities exempted from the Act by sect. 62; or to Places of Religious Worship falling under sect. 9, of 18 & 19 Vict. c. 81, *Glen v.*

*Gregg*, 21 Ch. D. 513; and see *Attorney-General v. Sidney Sussex College*, 15 W. R. 162, 21 Ch. D. 514, note. The authority of the Commissioners must be given formally in the manner directed by the Act, and a letter signed by the secretary of the board stating that "they were prepared to issue their certificate authorising the proceedings;" that "any difficulty in the application to the Court would probably be obviated by the production of the letter," and that "the certificate would be prepared and issued in due course," was held by *Frye, J.*, in a pressing case of an application for an injunction to be insufficient; *Thomas v. Harford*, 48 L. T. N. S. 262.]

(*g*) *Re Markwell's Legacy*, 17 Beav. 618; *In re Skeetes*, 1 Jur. N. S. 1037.

(*h*) *Re London, Brighton and South Coast Railway Company*, 18 Beav. 608.

(*i*) *Re Lister's Hospital*, 6 De G. M. & G. 184; *Re St. Giles and St. George, Bloomsbury*, 25 Beav. 313;

\* It has, however, been held *since the decision of the* [\*933] *Court of Appeal*, that a petition for the appointment of new trustees under a scheme previously settled by the Court requires the sanction of the Commissioners (a).

The Act contains other provisions (b) of a *preventative* rather than a *remedial* kind.

**Board authorised to give advice.** — By the 16th section, for instance, the Board has power to entertain applications for their *opinion or advice*, and persons acting in accordance therewith are indemnified.

**Provisions for vesting land, stock, &c.** — By the 48th section, *lands* belonging to any charity may be vested in the secretary of the Board as a corporation sole by the name of the *Treasurer* of Public Charities; and by the 51st section, annuities, stocks, shares, or securities held for any charity may be vested in the *Official Trustees* of charitable funds; and by the 54th and following sections, the Board have power when the ordinary jurisdiction is insufficient for the purpose to approve provisionally of *new schemes* of charities, *varying from the original endowment*, but which are to be submitted annually to Parliament for its ratification.

**8. Charitable Trusts Amendment Act.** — By the *Amendment Act*, 18 & 19 Vict. c. 124, by the 15th section, the name of the Treasurer of Public Charities is abolished, and the secretary of the Board for the time being is styled the *Official Trustee* of charity *lands*; and by the 17th and 18th sections, the Act provides for the appointment of the *Official Trustees* of charitable *funds*, to consist of the secretary of the Board for the time being, and such other persons as the Lord Chancellor may appoint, who are to have perpetual succession.

**9. Charitable Trusts Act, 1860.** — By “*The Charitable Trusts Act, 1860*” (23 & 24 Vict. c. 136), the Charity Commissioners

*Braund v. Earl of Devon*, 3 L. R. Ch. App. 800; [*Re William of Kyngeston Charity*, 30 W. R. 78.]

(a) *Re Jarvis's Charity*, 1 Dr. & Sm. 97; and see *Re Bingley School*, 2 Drew. 283; *Re Ford's Charity*, 3

Drew. 324; both, however, decided previously to the appeal decisions in p. 932, note (i).

(b) See pp. 540, 547, *supra*, for powers of sale, leasing, &c. given by the Acts.

are enabled by s. 2 to make such orders as may be made "by any Judge of the Court of Chancery sitting at *Chambers* (c), or by any *County Court* or *District Court of Bankruptcy* (d), for the appointment or removal of any schoolmaster or schoolmistress or other officer thereof, or for or relating to the assurance, transfer, or payment of any real or personal estate," belonging to the charity, or for the establishment of any scheme. But, by sect. 4, no such order is to be made where the charity income exceeds 50*l.*, except on the application of the majority of the trustees; and no trustee [\*934] is to be removed on the ground only \*of religious belief; and by sect. 5, the Commissioners are not to make orders in any case, which by reason of its contentious character or otherwise may be considered by them more fit to be heard by the judicial Courts (a).

## II. Of the *extent* of redress.

### **What account will be directed of mesne rents and profits.**—

Under this head we propose to enquire only within what period of time the account of *mesne rents and profits* directed against *trustees* of charities guilty of a breach of trust will be restricted.

1. **The account not affected by Statutes of Limitation.**—It is clear that in informations against *trustees of charities* the old *Statutes of Limitation* opposed no bar to the account, because charities were held exempt from the purview of the Statutes, and the claim was by *cestui que trust* against an *express trustee* (b); and although it was at one time considered that the Statute might afford a good rule how far back to carry the account (c), this doctrine was afterwards overruled (d). And now, 3 & 4 W. 4, c. 27, though applicable to charities (e),

(c) See 16 & 17 Vict. c. 137, s. 28.

(d) *Ib.* s. 32.

(a) As to the effect of the 5th section, see *Re Hackney Charities*, 34 L. J. N. S. Ch. 169; *Re Burnham National Schools*, 17 L. R. Eq. 241.

(b) *Attorney-General v. Mayor of Exeter*, Jac. 448, *per* Sir T. Plumer; *Attorney-General v. Brewers' Com-*

*pany*, 1 Mer. 498, *per* Sir W. Grant; see *Incorporated Society v. Richards*, 1 Conn. & Laws. 58; 1 Dru. & War. 258.

(c) *Anon. case*, 2 Eq. Ca. Ab. 12, pl. 20; *Love v. Eade*, Rep. t. Finch, 269.

(d) See cases in note (b).

(e) See p. 884, *ante*.

does not limit the liability of express trustees to account (*f*); so that charity trustees must as express trustees account upon the same footing as before the Act.

2. **Bar to the account from inconvenience of relief.**— But the Court may set a limit to the account on the ground of *inconvenience*. “It is the constant practice of Courts of equity,” said Sir Thomas Plumer, “to discourage stale demands; and this principle has often been acted upon in cases of charities. When there has been a long period, during which a party has, under an innocent mistake, misapplied a trust fund from the *laches* and neglect of others, that is, from no one of the public setting him right, and when the accounts have, in consequence, become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, and the great hardship of calling upon representatives to refund what families, acting on the notion of its being their property, have spent, has been in the habit, while giving relief, of fixing a period to the account” (*g*).

3. **Period to which account is carried back varies according to circumstances.**— The period to which the account has been carried back has \*varied according to the [\*935] circumstances presented to the consideration of the Court. Where no inconvenience can be objected, the Court will as a general rule carry back the account to the time of commencement of the misapplication.

4. Thus in *Attorney-General v. The Mayor of Exeter* (*a*), where the defendants admitted possession of the charity estate for the last 200 years, and stated that they had *always been ready and willing to account for the rents*, Sir W. Grant ordered the defendants to account for the whole period, and this decision was affirmed by Sir T. Plumer on a rehearing, and by Lord Eldon on appeal.

5. In *Attorney-General v. the Corporation of Stafford* (*b*), the trustees in their answer, filed in 1811, had furnished accounts of the trust estate from the year 1791, and Lord Gif-

(*f*) *Hicks v. Sallitt*, 3 De G. M. & G. 816.

(*g*) *Attorney-General v. Mayor of Exeter*, Jac. 448.

(*a*) Jac. 443; 2 Russ. 362.

(*b*) 1 Russ. 547.



ford saw no inconvenience in decreeing the account as far back as the trustees themselves had stated it, but refused to extend it farther.

6. In *Attorney-General v. The Brewers' Company (c)*, Sir W. Grant directed the trustees to account from the date of a certain Act of Parliament, a period of about *thirty* years. In a more recent suit against a corporation the account was carried back to the last appointment of new trustees of the corporation, a period short of *ten* years. And in another contemporaneous suit against the same corporation, but where the legal estate was not in trustees, but in the corporation itself, the Court by analogy, and for want of another fixed point, ordered the account to commence at the date of the last appointment of new trustees in the first suit (*d*).

7. **Various other periods adopted.** — In other cases the account has been carried back to the period when the corporation was first informed of the misapplication (as by the publication of the Charity Commissioners' Report); in other cases it has been directed from the time of filing the information, and in others from the date of the decree (*e*).

8. **Compromise with Attorney-General.** — Occasionally, where the defendant has been in strictness accountable for a very long period, but the right, if enforced, would impose great hardship, it has been referred to the Attorney-General, as representing the charity, to certify whether under the circumstances it might not be proper for the charity to accept a less sum (*f*).

[\*936] \* 9. **Trustees acting 'from mistake.** — Where the trustees have diverted the charity funds from their proper channel through *mistake*, it is now settled, that the Court will not call back any disbursements made before the commencement of the proceedings (*a*), or before the trustees

(c) 1 Mer. 495.

(d) *Attorney-General v. Mayor of Newbury*, 3 M. & K. 647.

(e) See *Attorney-General v. Drapers' Company*, 6 Beav. 390.

(f) *Attorney-General v. Mayor of Exeter*, 2 Russ. 370; and see *Attorney-General v. Corporation of Carlisle*, 4

Sim. 279; *Attorney-General v. Brettingham*, 3 Beav. 91; *Attorney-General v. Pretymann*, 4 Beav. 462.

(a) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; affirmed, 3 Russ. 395; *Attorney-General v. Dean of Christchurch*, Jac. 474, 637; S. C. 2 Russ. 321; *Attorney-General*

had notice that the propriety of such application would be called into question (*b*). The Court holds a strict hand over trustees where there is any wilful misemployment; but where the Court sees nothing but mistake, while it gives directions for the better management in future, it refuses to visit with punishment what has been transacted in time past. To carry back the account to the very commencement of the misapplication would be the ruin of half the corporations in the kingdom (*c*); besides, to act on such a principle would be a great discouragement to undertake the office of trustees of charities (*d*).

10. **Distinctions between corporations and individuals.** — If an individual make an annual payment for a particular purpose out of the profits of his estate, it is a reasonable presumption, from the strong interest which he has to resist an unfounded demand, that he has enquired into the origin of the claim, and he is therefore fixed with implied notice of all the circumstances that attend it; but the same presumption cannot be applied to corporations, because, having no immediate personal interest in the application of the profits of the corporate property, they may, without the imputation of culpable negligence, adopt and follow the practice of their predecessors (*e*).

11. **Breach of trust by a parish.** — Where the charity fund has been administered by a *parish* and misapplied, there, as a parish is a fluctuating body, and the present ratepayers ought not to pay for past defaults, no retrospective account can be ordered (*f*).

*v. Rigby*, P. W. 145; *Attorney-General v. Caius College*, 2 Keen, 150; *Attorney-General v. Drapers' Company*, 4 Beav. 67; *Attorney-General v. Christ's Hospital*, Ib. 73; and see *Attorney-General v. Mayor of Newbury*, 3 M. & K. 650.

(*b*) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 35, see 37; and see *Attorney-General v. Corporation of Berwick-upon-Tweed*, Tam. 239; *Attorney-General v. Caius College*, 2 Keen, 150.

(*c*) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 37, *per* Sir J. Leach.

(*d*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 54, *per* Lord Eldon.

(*e*) *Attorney-General v. Burgesses of East Retford*, 2 M. & K. 38, *per* Sir J. Leach.

(*f*) *Ex parte Fowlser*, 1 J. & W. 70; and see cases cited Ib. 73, note (*a*).

12. **Mode of attaching the corporation property.**—In the East Retford case (*g*), before Sir J. Leach, the Court, on proof of a breach of trust by the corporation, directed an enquiry by the Master of what property the corporation was possessed not \*devoted to special purposes, with the view that compensation might be made to the charity by an immediate *sale*; but the case upon that point was subsequently appealed against and reversed, as contrary to principle (*a*), and the plaintiff must now confine himself to a sequestration against the corporation in the ordinary course.

(*g*) 2 M. & M. 35.

ney-General v. Newark-upon-Trent, 1

(*a*) 3 M. & Cr. 484; and see Attor-

Hare, 395.

MAXIMS OF EQUITY FOR SUSTAINING THE TRUE CHARACTER  
OF THE TRUST ESTATE AGAINST THE LACHES OR TORT  
OF THE TRUSTEE.

BESIDES the several rights and remedies which have just been the subject of discussion, the Court, with the view of *keeping the trust estate in its regular channel, and sustaining its proper character, whether of realty or personalty, against the laches or other misbehaviour of the trustee*, has found it necessary to establish two maxims, which we now proceed to examine: viz., *First*, What ought to be done should be considered as done (a); and, *Secondly*, The act of the trustee shall not alter the nature of the *cestui que trust's* estate (b).

SECTION I.

WHAT OUGHT TO BE DONE SHALL BE CONSIDERED AS DONE.

1. **General principle.** — “The forbearance of the trustees,” said Sir J. Jekyll, “in not doing what it was their office to have done, shall in no sort prejudice the *cestuis que trust*, since at that rate it would be in the power of trustees,

(a) *Walker v. Denne*, 2 Ves. jun. 183, *per* Lord Loughborough; *Foone v. Blount*, Cowp. 467, *per* Lord Mansfield; *Holland v. Hughes*, 16 Ves. 114, *per* Sir W. Grant; *Gaskell v. Harman*, 11 Ves. 507, *per* Lord Eldon; *Stead v. Newdigate*, 2 Mer. 530, *per* Sir W. Grant; *Pulteney v. Darlington*, 1 B. C. C. 237, *per* Lord Thurlow; *Burgess v. Wheate*, 1 Eden, 186, *per* Sir T. Clarke; *Lechmere v. Earl of Carlisle*, 3 P. W. 215, *per* Sir J. Jekyll; *Fitzgerald v. Jervoise*, 5 Mad.

29, *per* Sir J. Leach; *Earl of Buckingham v. Drury*, 2 Eden, 65, *per* Lord Hardwicke; *Guidot v. Guidot*, 3 Atk. 256, *per* Lord Hardwicke; *Crabtree v. Bramble*, Ib. 687, *per eundem*; *Trafford v. Boehm*, Ib. 446, *per eundem*; *Astley v. Earl of Essex*, 6 L. R. Ch. App. 898; &c.

(b) *Philips v. Brydges*, 3 Ves. 127, *per* Lord Alvanley; *Earlom v. Saunders*, Amb. 242, *per* Lord Hardwicke; *Selby v. Alston*, 3 Ves. 341, *per* Sir R. P. Arden.

[\*939] either by doing or delaying to do their duty, to \* affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that '*What ought to have been done shall be taken as done,*' and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money" (a). And Lord Macclesfield, in the case of a bequest to a trustee for purchasing lands, observed, "If the purchase had been made it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient*" (b).

2. **Money to be laid out on land to be regarded as land.** — Upon these grounds it is in equity a universal rule, that *money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted*; <sup>1</sup> and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose,

(a) *Lechmere v. Earl of Carlisle*, 3 P. W. 215.

(b) *Scudamore v. Scudamore*, Pr. Ch. 543.

<sup>1</sup> What powers a trustee is to have in respect to converting the trust estate, must be determined from the language of the trust; *Hidden v. Hidden*, 103 Mass. 59. If it appear that the particular property placed in trust, is to be enjoyed by the *cestui que trust*, no conversion was intended; *Harrison v. Foster*, 9 Ala. 955; *Dunbar v. Woodcock*, 10 Leigh, 628; and the remaindermen must take it subject to whatever reasonable wear and tear it has undergone; *Ibid.*; yet it will be presumed, if possible, that the settlor intended to allow conversion; *Covenhoven v. Shuler*, 2 Paige, 122; *Smith v. Barham*, 2 Dev. Eq. 420; *Cairns v. Chaubert*, 9 Paige, 160; *Henderson v. Vaulx*, 10 Yerg. 30. If the *cestui que trust* is to enjoy the specific property placed in trust, it would naturally follow that he should be put in possession; *Holman's App.* 12 Harris, 178; *Evans v. Inglehart*, 6 Gill. & Johns. 171; and the remainderman will take whatever is left; *Shaw v. Hussey*, 41 Me. 495; *Tyson v. Blake*, 22 N. Y. 558; the trustee has a liability to protect the remainderman; *Wootten v. Burch*, 2 Md. Ch. 190; *Williamson v. Williamson*, 6 Paige, 298; *Eischelberger v. Barnett*, 17 Serg. & R. 293; that will vary according to circumstances; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Smith v. Barham*, 2 Dev. Eq. 420.

or is only covenanted to be paid, and whether the land has been actually conveyed, or is only agreed to be conveyed (*c*).

3. **Subject to curtesy.** — Thus, if money be stipulated to be laid out in land to be settled on a *feme covert* in fee or in tail, the husband of the *feme* is entitled to his *curtesy*, though no purchase be actually made in the lifetime of the wife; and he will be decreed the interest of the money until a purchase can be found; and when the investment has been made, he will have a life estate in the lands (*d*).

4. **Whether subject to dower.** — Whether under similar circumstances a widow could, before the late Dower Act, have established her title to *dower*, was much questioned. It was admitted she was not dowable of a *mere trust estate* (*e*); but, where money was to be converted into land, and the interest was only prevented from being legal through the forbearance of the trustee, it was contended that the rights of parties ought not to be varied by the neglect of the person who was merely the instrument for carrying out the settlor's wishes.

**Lord Hardwicke's opinion.** — The opinion of Lord Hardwicke was on more than one occasion \*expressed [\*940] adversely to the wife's claim (*a*); but there are several authorities in favour of the right to dower (*b*).

**Late Dower Act.** — By the late Act (except where the marriage was celebrated on or before the 1st day of January, 1834), the Legislature has given dower out of every species of trust estate in possession; subject to be defeated, however, by any declaration of intention on the part of the husband (*c*).

[5. **Letters of administration.** — Money which has arisen from settled land sold under the Settled Estates Acts and

(*c*) *Fletcher v. Ashburner*, 1 B. C. C. 499; and see *Wheldale v. Partidge*, 5 Ves. 396.

(*d*) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 B. C. C. 405.

(*e*) Altered by the late Act, 3 & 4 W. 4, c. 105.

(*a*) See *Cunningham v. Moody*, 1 Ves. 176; *Crabtree v. Bramble*, 3 Atk. 687.

(*b*) *Fletcher v. Robinson*, cited *Dudley v. Dudley*, Pr. Ch. 250; S. C. stated from R. L. in *Banks v. Sutton*, 2 P. W. 709; *Otway v. Hudson*, 2 Vern. 583; *Banks v. Sutton*, 2 P. W. 700; *Re Lord Lismore*, 1 Hog. 177; and see the arguments of Sir J. Jekyll in *Banks v. Sutton*, 2 P. W. pp. 704, 706.

(*c*) See p. 737, *supra*.

liable to be reinvested in land under those Acts is not a proper subject for letters of administration, so as to give jurisdiction to the Court to grant such letters (*d*).]

6. **Money to be laid out in land is not subject to escheat.** — If money be articulated, or directed, to be laid out in land to be settled on a person in fee, and the *cestui que trust* dies without heirs, there can, as a general rule, be no claim for an escheat by any one, since until the land is actually purchased it is uncertain who will fill the character of lord (*e*). Cases might no doubt occur free from this element of uncertainty, as where the trust is to lay out money in the purchase of lands in the parish of A., all the lands in which are held under the same lord; but even in such a case the lord would fail to establish his claim, for a lord by escheat comes under no head of equity — is entirely a stranger to the trust, claiming by title paramount of his own (*f*). The pretence for his claim would be, that the operation of the rule so absolutely converts the equitable into a legal estate, that all the incidents, that would have belonged to the legal, must be considered in equity as attaching to the equitable estate; but the rule was meant not to benefit third persons, but to protect the interests of *parties to the trust*.

7. **How affected by the *cestui que trust's* will.** — As money to be laid out in land is regarded as land, it could not even before the late Wills Act, have been devised by an infant, though of sufficient age to bequeath personal estate (*g*); and, for the same reason, it will pass by the *cestui* [\* 941] *que trust's* will under the \* general description of all the testator's *lands* (*a*), or of all his lands in the

[(*d*) *Re Goods of Lloyd*, 9 P. D. 65.]

(*e*) This point escaped notice in *Walker v. Denne*, 2 Ves. jun. 170, and it seems to have been assumed that the *Crown* would be the lord.

(*f*) *Walker v. Denne*, 2 Ves. jun. 185, *per* Lord Loughborough; *Henchman v. Attorney-General*, 3 M. & K. 494, *per* Lord Brougham.

(*g*) *Carr v. Ellison*, 2 B. C. C. 56; *Earlomi v. Saunders*, Amb. 241. By

the late Act, 7 W. 4, & 1 Vict. c. 26, an infant cannot make a will even of personal estate.

(*a*) *Guidot v. Guidot*, 3 Atk. 256, *per* Lord Hardwicke; *Rashleigh v. Master*, 1 Ves. jun. 201; S. C. 3 B. C. C. 99; *Green v. Stephens*, 17 Ves. 77; *Biddulph v. Biddulph*, 12 Ves. 161; [*Chandler v. Pocock*, 15 Ch. D. 491; *Re Greaves' Settlement Trusts*, 23 Ch. D. 313.]

county of — or *elsewhere* (*b*), though in the latter case it was very plausibly contended, that the testator could not have referred to money, but must have alluded to something that possessed a local character. [But where the money is subject to a general power of appointment by will, and *there is no intermediate interest* in any person who after the death of the donee of the power would have a right to call for its investment in land, and the donee has shown an intention in his lifetime to make the money personal estate so far as he can, it will pass under a general bequest by the donee of all his personal estate (*c*).]

8. **Is subject to judgments.**— So money to be converted into land was bound by a *judgment* (*d*), and was never accounted *personal assets*, and therefore was not until the late Act (*e*), liable to the payment of simple contract debts (*f*).

9. **Orphanage share.**— So a gift by a parent (a freeman of the city of London) to a child, of *money to be laid out in land* was considered a purchase by the father and a donation of the estate, and consequently, under the law existing before the late Act (*g*), the child was not bound, before receiving his orphanage share, to bring the purchase into hotch-pot (*h*).

10. **In what cases money to be laid out on land goes to the heir.**— With respect to the *heir* of the person upon whom the lands, when purchased, are directed or agreed to be settled, it is necessary, for ascertaining his rights, to distinguish between the cases where the real representative claims as against a *stranger*, and where he claims as against the *executor of his own ancestor*.

(*b*) *Lingen v. Sowray*, 1 P. W. 172; *Guidot v. Guidot*, 3 Atk. 254.

[(*c*) *Chandler v. Pocock*, 15 Ch. D. 491; 16 Ch. D. 648; and see *Re Greaves' Settlement Trusts*, 23 Ch. D. 313.]

(*d*) *Frederick v. Aynscombe*, 1 Atk. 392.

(*e*) 3 & 4 W. 4, c. 104.

(*f*) *Whitwick v. Jermin*, cited *Baden v. Earl of Pembroke*, 2 Vern. 58; *Lawrence v. Beverly*, cited *Ib.*

55; S. C. 2 Keb. 841; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 B. P. C. 550; *Foone v. Blount*, Cowp. 467, *per* Lord Mansfield. Money to be laid out on a purchase of land is not land for the purposes of the Stamp Acts, but pays legacy duty; *Re De Lancey*, 4 L. R. Ex. 345; 5 L. R. Ex. 102.

(*g*) 19 & 20 Vict. c. 94.

(*h*) *Hume v. Edwards*, 3 Atk. 450; *Annand v. Honeywood*, 1 Vern. 345.



**Case of the heir claiming against a stranger.**—It appears to be perfectly established that the heir is entitled to the money as land, if he seek to enforce his equity against a *stranger*. Thus, 1. If a sum of money be *bequeathed* to be laid out in a purchase of lands to be settled to the use of A.

and his heirs, and A. dies before a purchase has been [\*942] obtained, the money is the \*property, not of the executor, but of the heir of A. (*a*). 2. If on the

marriage of A. money be *actually deposited* in the hands of trustees, either by A. himself or by a stranger, to be laid out in a purchase of lands to be settled to the use of A. for life, remainder to his wife for life, remainder to the issue in tail, remainder to A. in fee, and A. dies without issue, his heir, and not his executor is entitled (*b*). 3. If on the marriage of A. there be a *covenant* on the part of B. to lay out money in a purchase of lands to the above uses, and A. dies without issue, his heir takes the benefit of the covenant (*c*).

11. **Case of the heir claiming against the executor of his own ancestor.**—But if the heir have to enforce his claim, not against a stranger, but against the *personal representative of his own ancestor*, as if A. on his marriage covenant to lay out money in a purchase of lands to be settled to the use of himself for life, remainder to his wife for life, remainder to the issue in tail, remainder to his own right heirs, in this instance the question whether the heir can call upon the executor for the money must depend upon this further distinction:—

*a. The heir has a right, if any person has an equitable interest.*—If at the death of A. there be an equitable interest in

(*a*) *Scudamore v. Scudamore*, Pr. Ch. 543. *Abbot v. Lee*, 2 Vern. 284, at first sight appears *contra*, but it seems from the Registrar's book that the direction for conversion was not imperative, but to be at the discretion of the testator's executors. Had the money been absolutely converted into *land*, the ultimate remainder would, by failure of issue of the surviving daughter, have resulted as personal estate of the *testator* (see p. 152, *ante*); but being *money* absolutely be-

queathed, subject to a discretion to lay out on land which was not exercised, it belonged to the administrator of the legatee, as was decreed. The case is stated from Reg. Lib. in Appendix No. II. to 3d edition of this Treatise.

(*b*) *Disher v. Disher*, 1 P. W. 204; *Chaplin v. Horner*, Ib. 483; *Edwards v. Countess of Warwick*, 2 P. W. 171; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(*c*) *Knights v. Atkyns*, 2 Vern. 20.

the fund outstanding in another, as a life estate in the wife, [or a right in a jointress to have a rent-charge (*d*).] or an estate tail in the issue, then the real quality of the money is sustained and continued by that right, and the heir of A. is entitled to call upon A.'s executor to pay the money (*e*); and if there be such an outstanding claim at the death of the ancestor, the circumstance that the heir institutes his suit during the subsistence of that claim, or after its determination, seems to be immaterial (*f*).

**Walker v. Denne.**—In *Walker v. Denne* (*g*), Lord Loughborough expressed some doubt upon this doctrine. "Between the heir and personal \*representative," [\*943] he said, "their rights are pure legal rights: chance decides what shall be real, what personal; neither has a *scintilla* of equity to make the property that which it is not in fact." To this reasoning of Lord Loughborough it may be replied, that, when it is said there is no equity between the real and personal representatives, the meaning is no more than this—that what is real estate at the death of the ancestor will go to the heir, and what is personal estate at the death of the testator will go to the executor; but, for the purpose of determining what *is* real and what *is* personal estate, the Court is guided, not by the *legal* nature of the property at the death of the owner, but, as appears in numerous instances, by the stamp and character impressed upon it in consideration of a Court of equity. Thus if a *mortgagee in fee* die, the mortgage being regarded as a mere security for part of the mortgagee's personal estate, the executor may call upon the heir for a conveyance of the land (*a*). So, if the *mortgagor* die, the heir of the mort-

[(*d*) *Walrond v. Rosslyn*, 11 Ch. D. 640. Semble, it would be otherwise if the only right were that of portionists to have their portions raised, S. C.]

(*e*) *Kettleby v. Atwood*, 1 Vern. 298; re-heard, *Ib.* 471; *Lancy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Earl of Carlisle*, 3 P. W. 211; affirmed *Cas.*

*t. Talbot*, 89; *Oldham v. Hughes*, 2 Atk. 452.

(*f*) See *Chaplin v. Horner*, 1 P. W. 483; *Lechmere v. Lechmere*, *Cas.* t. Talb. 80.

(*g*) 2 Ves. jun. 175, 176, 183; and see *Oxenden v. Lord Compton*, *Ib.* 70; *Lord Compton v. Oxenden*, *Ib.* 265.

[(*a*) Now by 44 & 45 Vict. c. 41, s. 30, where the death has occurred since

gagor might until Locke King's Act have called on the executor to discharge the incumbrance out of the personal assets. So if a person contract for the sale of an estate, and die before the completion of the sale, the legal fee descends upon the heir (*b*), but the purchase-money passes to the executor; and on the other hand, if a person contract for the purchase of an estate, and die, the executor must pay the money, but the heir is entitled to the purchase (*c*). Thus, in the words of Lord Talbot, "Where the dispute is between the two representatives of the deceased, the one of his real, the other of his personal estate, the heir's being but a volunteer in regard to his ancestor will not exclude him from the aid of the Court, for though the question is between two volunteers, the Court will determine which way the right is, and will decree accordingly" (*d*). "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn in *Walker v. Denne*, and some other modern authorities, that if the instrument be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed [\*944] with real \* uses as land, and one of those uses being for the benefit of the heir, it will remain for his benefit, and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir" (*a*). And Sir W. Grant to the same effect observed, "There is no weight in the circumstance that the property is found in the shape of money or land, *for the character is to be found in the deed*. The opinion of Lord Rosslyn that property was to be taken

the 31st December, 1881, the land devolves upon the executor.]

[(*b*) Now by 44 & 45 Vict. c. 41, s. 4, where the death has occurred since the 31st December, 1881, if the contract is enforceable against the heir or devisee of the vendor, his personal representatives can convey the land for the purpose of giving effect to the contract; and see also sect. 30.]

[(*c*) But since the recent Act the estate in the hands of the heir will be subject to the repayment to the executor of the purchase-money paid by him; 40 & 41 Vict. c. 34; *Re Cockcroft*, 24 Ch. D. 94.]

(*d*) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(*a*) *Wheldale v. Partridge*, 8 Ves. 235.

as it happened to be at the death of the party from whom the representatives claimed, was much doubted by Lord Eldon, who held, *in which I perfectly concur*, that it must be considered as being in the state in which it *ought to be*. Lord Rosslyn's rule was new, and not according to prior cases" (b).

β. **Heir has no right where the money is "at home."** — But if A. die, leaving neither wife nor issue, so that, to use the technical expression, the money is "at home," that is A. at the time of his death is the absolute and exclusive owner, and there is no outstanding right in another person, in this case the real quality of the money has become merged and extinguished, and on the death of A. the heir has no equity to call upon the executor. To keep on foot the *notional* conversion of money into land, it is evident there must be a right in some one to insist upon the *actual* conversion; but if A. be in possession of 20,000*l.* upon trust to lay out in a purchase of lands to be settled to the use of himself and his heirs, the right and the thing both centering in the same person, there is nobody to sue, and it follows that the action is extinguished (c).

The decision in the much litigated case of *Chichester v. Bickerstaff* (d), amounted probably to no more than this. On the marriage of Sir J. Chichester with the daughter of Sir C. Bickerstaff, the latter agreed to pay 1500*l.* by way of portion, which, together with 1500*l.* more to be advanced by Sir John Chichester within three years after the marriage, was to be invested in lands to be settled on Sir John for life, remainder to his wife for life, remainder to the issue in tail, remainder to Sir John in fee. Sir John and his lady, within one year after the marriage, both died without issue, the husband having survived. Sir John by his will *made Sir C. Bickerstaff his executor*, and bequeathed the residue of his personal estate, after payment of his debts, &c., to Frances Chichester, his sister. The heir at law of Sir John brought

(b) *Thornton v. Hawley*, 10 Ves. 138; *Kirkman v. Miles*, 13 Ves. 339.

(d) 2 Vern. 295; S. C. cited *Pulteney v. Darlington*, 7 B. P. C. 554.

(c) See *Pulteney v. Darlington*, 1 B. C. C. 237.

his bill against Sir Charles to compel him to pay the [\*945] 1500*l.* insisting that by virtue of \*the marriage articles the money ought to be looked upon as land, and therefore belonged to him as heir. Lord Somers said, "This money, though once bound by the articles, yet when the wife died without issue became free again, and was under the power and disposal of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this is much stronger where there is a residuary legatee;" and his Lordship dismissed the bill. Then follows what is apparently the note of the reporter, viz., that "money shall in many cases be considered as land when bound by articles in order to a purchase, but whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person, who might have aliened the land in case a purchase had been made."

**Errors respecting Chichester v. Bickerstaff.**—In this case it has been commonly, but surely without reason, supposed, that the suit of the plaintiff was for the 1500*l.* which Sir Charles had articed to pay, and in consequence of this misconception, the authority of the decision has repeatedly been called into question. Thus Sir J. Jekyll, overlooking the very material circumstance that Sir Charles had been appointed the executor of the testator, observes, "It is remarkable with respect to this case, that the wife died within three years after the marriage, during which period the purchase was to be made, so that the time was not come within which the money was to be laid out; and till then it continued money; and possibly the Court had some evidence to induce them to believe that Sir John Chichester looked on the money as personal estate; and *if this does not distinguish it from other cases, I doubt, in opposition to so many decrees, the resolution here given would hardly be maintainable*" (a). And Lord Talbot was apparently under the same misapprehension, for he observes, "Had the money in the case before me been

(a) *Lechmere v. Earl of Carlisle*, 3 P. W. 221.

*deposited in the hands of trustees*, it must have been looked upon as real estate, and the heir have been entitled. This seems to be granted, and no authority against it but what has been collected from the case of *Chichester v. Bickerstaff*. It is probable the Court went upon some reason, which induced it to think that Sir John looked upon that money as personal estate, for otherwise *the authority of that case is not to be maintained, being contrary to all former resolutions*" (b). But Lord Thurlow viewed the case in a different light, and evidently \*considered the 1500*l.* sought [\*946] by the bill of the plaintiff to be the 1500*l.* article*d* to be paid by the testator himself, and so payable out of his assets in the hands of Sir Charles Bickerstaff, his executor. "Where," said his Lordship, "a sum of money is *in the hands of one without any other use but for himself*, it will be money, and the heir cannot claim, *like the case of Chichester v. Bickerstaff*, against which I think there is no judgment, though there are a number of opinions. I know no better authority than that case" (a).

**Facts from the Registrar's book.** — The Registrar's book has been searched, but no *decree* can be found. It appears, however, from a motion in the cause for dissolving an injunction, that the circumstances of the case were as follows:—Sir Charles Bickerstaff had brought an action at law against the plaintiff, and had obtained a judgment for a certain sum upon a balance of accounts. Upon this the plaintiff instituted a suit in equity for staying the proceedings at law, alleging that Sir Charles stood indebted to him *in the sum of 3000*l.** to which the plaintiff was entitled as heir at law of Sir John, under Sir John's marriage articles. It was ordered by the Court, that judgment should be entered up, but execution should be stayed till the cause should be heard the Easter term following. As Vernon, the reporter, speaks only of one sum of 1500*l.*, to which the executor was declared entitled, it is probable the other sum was adjudged to the heir, a decision that would in every respect be conformable to principle; for while the 1500*l.* covenant*d* to be paid by Sir

(b) *Lechmere v. Lechmere*, Cas. t. Talb. 90.

(a) *Pulteney v. Darlington*, 1 B. C. C. 238.

John himself was, by the death of his wife without issue in his lifetime, "at home," and therefore set free from the articles, the other sum of 1500*l.* which was covenanted to be paid by Sir Charles, was outstanding in the hands of Sir Charles as trustee, and would therefore retain the character of real estate until some act by Sir John to remove that impression (*b*).

12. **Actual receipt of the money makes it "at home."** — Of course the money will be "at home" where the person absolutely entitled to the fund receives it from the trustee the depositary of it, and that, whether the payment was made with the sanction of the Court, or by the voluntary act of the trustee himself (*c*).

13. **Voluntary covenant to lay out money on land.** — Lord Macclesfield advanced the position, that if a person *voluntarily and without consideration* covenanted to lay out [\*947] money \*in a purchase of land to be settled on himself and his heirs, the Court would compel the execution of such a contract, though merely voluntary; for in all cases where it was a measuring cast between an executor and an heir, the latter should in equity have the preference (*a*). But the proposition that the heir is more favoured than the executor, though often repeated (*b*), and arising perhaps from the leaning of the Court towards the heir *in respect of lands of which the ancestor was seised*, does not appear to be founded on any intelligible principle, and the opinion expressed by Lord Macclesfield may be questioned.

14. **Conversion must be absolute or imperative, not optional.** — In the preceding observations it is assumed that the direction or agreement for conversion is by the terms of the instrument made *absolute and imperative*; for where a mere

(*b*) To the principle under consideration must be referred the case of *Pulteney v. Darlington*, 1 B. C. C. 223; affirmed in D. P.; see *Wheldale v. Partridge*, 8 Ves. 235; and see 3d ed. p. 803.

(*c*) See *Pulteney v. Darlington*, 1 B. C. C. 236; *Bowes v. Earl of Shaftes-*

*bury*, 5 B. P. C. 144; *Chaplin v. Horner*, 1 P. W. 483, as to the 1350*l.*

(*a*) *Edwards v. Countess of Warwick*, 2 P. W. 176; and see *Lechmere v. Lechmere*, Cas. t. Talb. 90, 91.

(*b*) See *Crabtree v. Bramble*, 3 Atk. 689; *Scudamore v. Scudamore*, Pr. Ch. 544; *Haytor v. Rod*, 1 P. W. 364; *Wilson v. Beddard*, 12 Sim. 32.

*option* is given, the original character of the property continues until the discretion has been exercised, and the conversion actually effected; as, if the direction or agreement be to lay out money in "lands *or* securities" (*c*), in "freeholds *or* leaseholds" (*d*), or if by any other mode of expression an intention be manifested of not converting the property at all events (*e*). [But a direction to trustees to sell "so soon as they shall see necessary for the benefit of the *cestuis que trust*" (*f*), or "whenever it shall appear to their satisfaction that such sale will be for the benefit of the *cestuis que trust*" (*g*), amounts to an imperative direction to convert.]

15. Of conversion, apparently optional, but where the uses declared are exclusively applicable to real estate. — Where the uses declared are exclusively applicable to real estate, the direction or agreement will be construed to be imperative, though the direction or agreement be to lay out the money in "*freeholds, leaseholds, or copyholds*" (*h*), or the instrument contains an authority to invest the money upon securities until a purchase can be found (*i*), or the fund being already out upon security, a power is \* inserted to call it in, and [\*948] lay it out upon other securities (*a*), or even though the direction or agreement be to lay out the money on lands *or* securities, the intention in the last case apparently being, that the money shall be invested upon security until a suitable purchase can be found, and that the interest and dividends in the meantime shall be paid to the person who would be entitled to the rents (*b*).

(*c*) *Curling v. May*, cited *Guidot v. Guidot*, 3 Atk. 255; *Amler v. Amler*, 3 Ves. 583; [*Evans v. Ball*, 30 W. R. 899; 47 L. T. N. S. 165;] and see *Van v. Barnett*, 19 Ves. 102.

(*d*) *Walker v. Denne*, 2 Ves. jun. 170; *Davies v. Goodhew*, 6 Sim. 585.

(*e*) *Wheldale v. Partridge*, 5 Ves. 388; S. C. 8 Ves. 227; and see *Abbot v. Lee*, 2 Vern. 284; *Davies v. Goodhew*, 6 Sim. 585; *Polley v. Seymour*, 2 Y. & C. 708; *Clissold v. Cook*, 27 L. T. N. S. 143; 20 W. R. 796.

[(*f*) *Doughty v. Bull*, 2 P. Wms. 320.]

[(*g*) *Re Raw*, 26 Ch. D. 601; *Robinson v. Robinson*, 19 Beav. 494.]

(*h*) *Hereford v. Ravenhill*, 5 Beav. 51; *Re Whitty's Trust*, 9 I. R. Eq. 41.

(*i*) *Edwards v. Countess of Warwick*, 2 P. W. 171; *Earlom v. Saunders*, Amb. 241; and see *Davies v. Goodhew*, 6 Sim. 585.

(*a*) *Thornton v. Hawley*, 10 Ves. 129; and see *Triquet v. Thornton*, 13 Ves. 345.

(*b*) *Earlom v. Saunders*, Amb. 241;



16. Conversion at "the request" or "with the consent" of a party. — And, where the uses are thus exclusively applicable to real estate, the direction or agreement will be regarded as imperative though the settlement require the purchase to be made at the *request* of a person (*c*), for the insertion of such a clause has been taken to mean, not that a conversion may not be effected *before* but that it shall certainly be effected *after* request (*d*). And the construction is the same, though the purchase be directed to be made with a person's *consent* and *approbation* (*e*); for upon a convenient purchase being proposed, the Court, said Sir J. Jekyll, will take upon itself to judge thereof, and, without some reasonable objection made, will order the money to be laid out in it, so that such a proviso seems to be immaterial, and as if omitted (*f*). But of course the instrument may be so strongly expressed as to show the intention of the parties, that the request or consent of a particular person should be a substantial ingredient, and that no conversion should take place unless it is given (*g*).

[In all these cases the real question is whether it appears from the whole tenor of the instrument that the intention was that the personalty should be converted into realty, and where such an intention appears a trust for conversion may be implied (*h*). But a mere gift of personalty with limitations appropriate to real estate, a great part of which limitations must necessarily fail as soon as the personalty vests in any one who, if it had been real estate, would have taken an estate tail, does not raise an implied trust for conversion into realty (*i*).]

Cowley v. Hartstonge, 1 Dow. 361; Johnson v. Arnold, 1 Ves. 169; Cookson v. Reay, 5 Beav. 22; 12 Cl. & Fin. 121; but see Atwell v. Atwell, 13 L. R. Eq. 23; [and see Evans v. Ball, 30 W. R. 899; 47 L. T. N. S. 165.]

(*c*) Thornton v. Hawley, 10 Ves. 129; Johnson v. Arnold, 1 Ves. 169.

(*d*) 10 Ves. 137; but see Stead v. Newdigate, 2 Mer. 530.

(*e*) Thornton v. Hawley, 10 Ves. 129; [Batteste v. Maunsell, 10 I. R. Eq. 97, 314.] In Symons v. Rutter, 2 Vern. 227, Sir G. Hutchins was

right, according to Sir J. Jekyll, Lechmere v. Earl of Carlisle, 3 P. W. 220, and Lord Thurlow, Pulteney v. Darlington, 1 B. C. C. 238; but see Stead v. Newdigate, 2 Mer. 530.

(*f*) Lechmere v. Earl of Carlisle, 3 P. W. 220, *per* Sir J. Jekyll; and see Costello v. O'Rorke, 3 Ir. R. Eq. 172.

(*g*) Davies v. Goodhew, 6 Sim. 585; and see *Re Taylor's Trust*, 9 Hare, 596; Sykes v. Sheard, 33 Beav. 114.

[(*h*) Evans v. Ball, *ubi supra*.]

[(*i*) Evans v. Ball, *ubi supra*.]

\*17. **Land to be converted into money is regarded [\*949] as money.** — As money to be converted into land is considered as land so *land to be converted into money is, upon the same principle, invested with all the properties of money (a)*. Thus, if an estate be directed or agreed to be sold, and the proceeds be made payable to A., the property, though unconverted at A.'s decease, will pass by a general bequest of all his *personal estate (b)*; and upon A.'s death, will vest in his *personal representative (c)*, and will be liable to *probate (d)*, and *legacy duty (e)*. And the result will be the same though the conversion is by the terms of the instrument of trust not to take place until after A.'s death (*f*). [And a will made by a married woman in exercise of a power and appointing the property is entitled to probate, though the property was unconverted at her death (*g*).]

18. **As to rents before conversion.** — But it has been held as a rule of convenience that if a testator direct his real estate to be sold, and the proceeds laid out and invested in trust for A. for life with remainders over, the tenant for life is entitled to the *rents* only of the estate from the testator's decease (*h*); and so, if the sale be directed on the death of a particular person the tenant for life is entitled only to the *rents* from the death of that person (*i*). But a tenant for

(a) But a settlement of land so circumstanced is not a settlement of a definite sum of money within the meaning of the Stamp Act; *Re Stucley's Settlement*, 5 L. R. Ex. 85.

(b) *Stead v. Newdigate*, 2 Mer. 521.

(c) *Ashby v. Palmer*, 1 Mer. 296; *Biggs v. Andrews*, 5 Sim. 424; *Bayden v. Watson*, 7 Jur. 245; *Burton v. Hodsoll*, 2 Sim. 24; *Grievson v. Kirsopp*, 2 Keen, 653; *Griffith v. Ricketts*, 7 Hare, 299; *Hardey v. Hawkshaw*, 12 Beav. 552; *Simpson v. Blackburn*, W. N. 1875, p. 157.

(d) *Attorney-General v. Brunning*, 4 H. & N. 94; reversed on appeal, 8 H. L. Cas. 243; *Attorney-General v. Lomas*, 9 L. R. Ex. 29; [*Attorney-General v. Hubbuck*, 10 Q. B. D. 488; 13 Q. B. D. 275; In the Goods of

*Gunn*, 9 P. D. 242; *Attorney-General v. Marquess of Ailesbury*, 14 Q. B. D. 895;] and see *Matson v. Swift*, 8 Beav. 308; *Custance v. Bradshaw*, 4 Hare, 324.

(e) *Forbes v. Stevens*, 10 L. R. Eq. 178.

(f) *Clarke v. Franklin*, 4 K. & J. 257.

[*(g)* In the goods of *Gunn*, 9 P. D. 242.]

(h) *Casamajor v. Strode*, cited *Walker v. Shore*, 19 Ves. 390; *Hutchinson v. Mannington*, 1 Ves. jun. 367, *per Cur.*

(i) *Fitzgerald v. Jervoise*, 5 Mad. 25, the marginal note of which does not exactly accord with the report itself.

life without impeachment of waste of the estate to be *purchased*, though entitled to the rents and profits of the estate to be *sold*, may not, as part of such profits cut timber on the estate to be sold, for this would give him double waste (*j*).

19. **Next of kin have no right where land is at home.** — The doctrine already explained with reference to the exclusion of the claim of the heir where the money is *at home* must, it is conceived, equally apply as against *next of kin* and *residuary legatees* in cases where the *land* may be said to [\*950] be at home. Thus, \*if A., being entitled to land, *covenant* on the occasion of his marriage to convey it to trustees, who are to sell and stand possessed of the proceeds upon trusts for the benefit of A. and his wife and the children of the marriage, with an ultimate trust for A. absolutely, here, if in A.'s lifetime and before any conveyance, the wife dies without children, both the land and the benefit of the ultimate trust are united in A., and the *land* is *at home*, and upon A.'s death, no claim can, it is conceived, be sustained by those entitled to his personal estate. But of course the case would be different, if land had been actually *conveyed* to the trustees upon trust for sale, since this would be analogous to a deposit in the hands of trustees as above supposed of money to be laid out in land (*a*); and consequently there would be a complete conversion, of which those entitled to the personal estate of A. would reap the benefit.

20. **Alien may take proceeds of sale.** — If the proceeds of sale of real estate be given to an *alien*, the doctrine of conversion applies in his favour. He was always capable of taking for his own benefit, and the Crown was excluded (*b*).

21. **Proceeds forfeitable for felony if land in fact sold, but not otherwise.** — [Prior to the recent Act abolishing forfeitures for felony it was held that] if a share of proceeds was given to a *felon*, and the time of sale had arrived, and the sale had

(*j*) *Plymouth v. Archer*, 1 B. C. C. 159; and see *Burges v. Lamb*, 16 Ves. 180.

(*a*) See p. 942, *supra*.

(*b*) *Du Hourmelin v. Sheldon*, 1 Beav. 79; 4 M. & Cr. 525; *Sharp v.*

*St. Sauveur*, 17 W. R. 1002; 20 L. T. N. S. 799, but overruled on another ground, 7 L. R. Ch. App. 343. See now as to aliens, 33 Vict. c. 14, and *supra*, p. 27.

been actually made before the felon had worked out his punishment, the Crown was entitled (*c*). But if the felon had worked out his punishment before the time of sale had arrived, there, as the Crown had no equity to compel the conversion, the discharged felon and not the Crown was entitled (*d*). Money paid into Court as representing land taken under the provisions of an Act of Parliament and liable to be laid out again in the purchase of land retained, as against the Crown, its character of real estate, and was therefore not forfeitable on conviction for felony (*e*).

22. **Proceeds cannot be bequeathed to a charity.** — It was at one time held that if real estate was stamped with a trust for conversion, and a portion of the proceeds of sale was given to A., and A. died having by his will given his *personal estate* to charity, his interest in the proceeds of sale was to be regarded as pure personal estate, and the bequest was good (*f*); but \*this doctrine has since been [\*951] overruled (*a*). And where a testator gave to A. a legacy 3000*l.*, payable out of the testator's personal estate, and the proceeds from the sale of his real estate, and A. bequeathed the 3000*l.* to a charity, it was ruled that the whole bequest was void, and that the charity was not entitled to claim so much of the 3000*l.* as on an apportionment of the original testator's real and personal estate would be found payable out of the pure personalty (*b*); [but in a subsequent case, where a testator gave a share of his residuary personal estate to charity, and the residuary estate consisted of pure personalty, and of a legacy from another testator payable out of the proceeds of his real and personal estate, an apportionment was directed, and the bequest was held to fail only so far as it arose from the portion of the legacy attributable to the realty, or to the person-

(*c*) *Re Thompson's Trusts*, 22 Beav. 506.

(*d*) *Ibid.* See now as to felons, 33 & 34 Vict. c. 23; and *supra*, p. 28.

(*e*) *Re Harrop's Estate*, 3 Drew. 720.

(*f*) *Marsh v. Attorney-General*, 2 J. & H. 61; *Attorney-General v. Har-*

*ley*, 5 Mad. 321; *Shadbolt v. Thornton*, 17 Sim. 49.

(*a*) *Brook v. Badley*, 4 L. R. Eq. 106; S. C. 3 L. R. Ch. App. 672; *Lucas v. Jones*, 4 L. R. Eq. 73.

(*b*) *Brook v. Badley*, 3 L. R. Ch. App. 672.

alty savouring of realty, of the testator who bequeathed the legacy (*c*).]

23. **Locke King's Act.** — A share of the proceeds to arise from a sale under a trust for conversion is not an interest in land within *Locke King's Act*, and therefore a legatee of such share, subject to a mortgage of it made by the testator, can call for a discharge of the mortgage out of the general personal estate (*d*).

24. **The conversion must be imperative.** — If real and personal estate be given to trustees upon trust for a class, with a *discretionary* and not an *imperative* power to convert the whole into personal estate, and if the trustees make a total or partial conversion, the objects of the trust will take the property as real or personal estate, according to the actual condition in which it is found (*e*). [But if the power be discretionary, and an order be made in an administration action directing a sale absolutely, the property is converted as from the date of the order (*f*).]

A mere declaration in a will that the residuary real estate shall for the purpose of transmission be impressed with the quality of personal estate from the time of the testator's death does not \* amount to a conversion of the real estate into personalty, but the property will notwithstanding the direction devolve as realty (*a*).]

25. **Case of a sale by mortgagee.** — So if a *mortgage* deed contain a power of sale with a direction that the surplus proceeds shall be paid to the mortgagor, his heirs, executors, administrators, and assigns, and the property is sold by the mort-

[(*c*) *Re Hill's Trusts*, 16 Ch. D. 173.]

(*d*) *Lewis v. Lewis*, 13 L. R. Eq. 218.

(*e*) *Walter v. Maunde*, 19 Ves. 424; *Atwell v. Atwell*, 13 L. R. Eq. 23; *Shipperdson v. Tower*, 1 Y. & C. C. 441; *Re Beaumont's Trusts*, 32 Beav. 191; *Polley v. Seymour*, 2 Y. & C. 708; *Edwards v. Tuck*, 23 Beav. 268; *Re Whitty's Trust*, 9 I. R. Eq. 41; and see *Yates v. Yates*, 28 Beav. 637; *Cowley v. Hartstonge*, 1 Dow,

378; *Bourne v. Bourne*, 2 Hare, 35; *Lucas v. Brandreth* (No. 1), 28 Beav. 273; *Beecroft v. Wilkin*, W. N. 1867, p. 117; *Re Ibbitson's Estate*, 7 L. R. Eq. 226; *Miller v. Miller*, 13 L. R. Eq. 263. Otherwise, where the power is imperative, *Grieverson v. Kirsopp*, 2 Keen, 653.

[(*f*) *Hyett v. Mekin*, 25 Ch. D. 735.]

[(*a*) *Hyett v. Mekin*, 26 Ch. D. 735.]

gagee, the surplus will be personal or real estate of the mortgagor, according as the sale takes place before or after his death (*b*).

**Case of option of purchasing.** — But where an option to purchase has been given to a lessee, and the option is exercised after the lessor's death, such exercise has been held to effect a retrospective conversion (*c*). The difference is, that in the case of a mortgage the mortgagor or his heir can redeem at any time, and therefore the real character of the property continues until the time of actual sale, when the proceeds become the personal estate of the person then entitled to the equity of redemption; but in the option given to a lessee, the lessor has parted with all control over the property and placed it in the power of another to change the nature of it, and if the power be exercised the conversion operates retrospectively and it becomes personal estate as between all who claim under the lessor. [But where the lessee dies without having exercised the option, the beneficial interest in the lease with the benefit of the option goes as part of his personal estate, and no subsequent exercise of the option will work a retrospective conversion as between the persons entitled to his realty and personalty respectively (*d*).]

**26. Where the mortgagee is a trustee for sale.** — If, instead of executing a mortgage, the debtor convey the estate to the creditor upon *trust* to sell and pay himself and hand over the balance to the debtor, his executors and administrators, and a declaration is inserted in the deed that it is not to be considered as in the nature of a mortgage, but as a conveyance

(*b*) *Wright v. Rose*, 2 Sim. & St. 323; and see *Clarke v. Franklin*, 4 K. & J. 260; *Bourne v. Bourne*, 2 Hare, 35; *Re Cooper's Trust*, 4 De G. M. & G. 768.

(*c*) *Lawes v. Bennett*, 1 Cox, 167; *Collingwood v. Row*, 4 Jur. N. S. 785; *Weeding v. Weeding*, 1 J. & H. 424; *Whitmore v. Douglas*, cited *Ripley v. Waterworth*, 7 Ves. 438; *Townley v. Bedwell*, 14 Ves. 590; [*Re Adams and the Kensington Vestry*, 27 Ch. D. 394; but see *Drant v. Vause*, 1

Y. & C. C. C. 580; *Emuss v. Smith*, 2 De G. & Sm. 722. [This retrospective conversion is, however, implied only as between the real and personal representatives of the person giving the option, and does not apply as between the vendor and the purchaser; *Edwards v. West*, 7 Ch. D. 858.]

[(*d*) *Re Adams and the Kensington Vestry*, 24 Ch. D. 199; 27 Ch. D. 394.]

to become absolute, in equity as well as at law, immediately after default in payment, here, though the sale is not [\*953] made in the debtor's lifetime, \*yet the property is converted into personalty, and belongs, subject to the charge, to the debtor's personal representative (a).

27. **Neither heir nor next of kin can claim under the will of an ancestor by virtue of the doctrine of conversion.** — In the above discussion of the doctrine of conversion, it may be taken to be generally immaterial whether the instrument which directs the money to be laid out in land or the land to be converted into money, is a deed, or writing, or will. But it may be useful to point out in reference to claims by an *heir at law* or by *next of kin*, that where the instrument effecting the conversion is a *will*, neither the *testator's* heir at law *as such*, nor his next of kin *as claiming under the intestacy*, can establish any right by virtue of the doctrine of conversion (b). The conversion directed is a conversion *for the purposes of the will only*, and so far as the trusts declared by the will respecting the property directed to be converted may fail, the property devolves, according to its original character of realty or personalty, in conformity with the principles established by the decisions respecting resulting trusts (c).

28. **But heir or next of kin may claim as *persona designata*.** — But of course either the heir at law or next of kin may claim as *persona designata*. Thus, where a testator bequeathed a sum of money to be laid out on lands to be settled to certain uses, with the ultimate remainder to his *own right heirs*, and the prior limitations failed, the heir, on a bill filed against the executor of his ancestor, was held entitled to the money (d); but here the title of the heir was not as *heir*, but as *purchaser* under the will.

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**Election.** — In connection with the subject of conversion, it is to be observed that where land is to be converted into

(a) *Re Underwood*, 3 K. & J. 745.

(b) This point seems to have escaped Lord Loughborough's notice in *Walker v. Denne*, 2 Ves. jun. 170,

though the cases upon resulting trusts were cited; see *Ib.* p. 173.

(c) See pp. 149 *et seq.* *ante*.

(d) *Robinson v. Knight*, 2 Eden, 155.

money, or money is to be converted into land, the notional conversion will subsist only until some *cestui que trust*, who is competent to *elect*,<sup>1</sup> intimates his intention to take the property in its original character (*e*). The Court will not compel a conversion against the will of the absolute owner; for should the conversion be made, he would immediately reconvert it, and equity will do nothing in vain (*f*).

Upon this subject we shall consider:—I. What persons are capable of electing; and, II. How the act of election may be manifested.

\* **Who may elect.**—I. Who may elect. [\*954]

1. **Infants, lunatics.**—In respect of *personal incapacity*, an infant (*a*), or lunatic (*b*), has no power to make election.

2. **Power of feme covert over money-land.**—As regards a *feme covert*, although she has no power to elect by act *in pais* (*c*) like a person who is *sui juris*, yet she may, by exercise of the powers of disposition given her by law over money to be laid out in land, or land directed to be turned into money, alter the nature of the property, and so effect an election.

(*e*) *Harcourt v. Seymour*, 2 Sim. N. S. 45; *Cookson v. Reay*, 5 Beav. 22; 12 Cl. & Fin. 121; *Dixon v. Gayfere*, 17 Beav. 433.

(*f*) *Seely v. Jago*, 1 P. W. 389.

(*a*) *Carr v. Ellison*, 2 B. C. C. 56; *Earlom v. Saunders*, Amb. 241; *Thornton v. Hawley*, 10 Ves. 129, 139; *Van v. Barnett*, 19 Ves. 102; *Seeley v. Jago*, 1 P. W. 389; *Re Harrop's Estate*, 3 Drew. 734; and see *Ashby v. Palmer*, 1 Mer. 301.

(*b*) *Ashby v. Palmer*, 1 Mer. 296.

(*c*) The election here treated of must not be confounded with that which a *feme covert* is bound to make under the general doctrine of election; as to which, see *Barrow v. Barrow*, 4 K. & J. 415, 419; *Griggs v. Gibson*, 1 L. R. Eq. 685; *Cooper v. Cooper*, 7 L. R. H. L. 53; [*Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124.]

<sup>1</sup> The trust fund remains such so long as it can be identified; *McLarren v. Brewer*, 51 Me. 402; *Overseers of Poor v. Bank*, 2 Gratt. 544; but after the identity is lost there are no preferences; *Thompson's App.* 22 Pa. St. 16. The *cestui que trust* may, if *sui juris*, elect to rely upon his lien on the trust property, or to hold the trustee personally responsible; *Wallace v. McCollough*, 1 Rich. Eq. 426; *Ensley v. Balentine*, 4 Humph. 233; *Wallace v. Duffield*, 2 Serg. & R. 529; *Hoffman v. Carow*, 22 Wend. 285; *Pascoag Bank v. Hunt*, 3 Edw. Ch. 583; *Bassett v. Spofford*, 45 N. Y. 387.



3. **How feme covert might elect to take money-land under the old law.** — “Although,” said Lord Hardwicke, “a *feme covert* cannot alter the nature of money to be laid out in land by contract or deed, yet if the money be invested in land (and sometimes sham purchases have been made for the purpose (*d*)), she may then levy a fine on the land, and give it to her husband, or any body else. There is a way, also, of doing this without laying the money out in land, and that is, by coming into a Court of equity, and consenting to take the money as personal estate; for upon her being present in Court, and being examined (as a *feme covert* upon a fine is), her consent binds the money artied to be laid out in land as much as a fine at law would the land, and she may dispose of it to the husband or any body else. And the reason of it is, that at law, money so artied to be laid out in land is considered barely as money until an actual investment, and the equity of this Court alone views it in the light of real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land” (*e*). And, at a later date, Lord Hardwicke’s views were ratified by express decision; for where money was devised to be laid out in land, for a *feme covert* in tail with reversion to her in fee, and a bill was filed by her, it was declared that she was entitled to the money, and a commission was ordered to be issued to examine her separate and apart from her husband, touching the disposition thereof (*f*). [So in a recent case, [\*955] money in Court which had arisen \*from a sale under the Partition Acts, and to shares in which married women were entitled, was, upon their being separately examined and consenting, distributed as personal estate (*a*); and where the share of the married woman is less than 200*l*. the Court will dispense with her separate examination (*b*).]

(*d*) See *Henley v. Webb*, 5 Mad. 407.

(*e*) *Oldham v. Hughes*, 2 Atk. 453.

(*f*) *Binford v. Bawden*, 1 Ves. jun. 512; [and from a subsequent report of this case, 2 Ves. 38, it appears that the *feme covert* on being examined elected to have the money paid

to her husband; and see *Standerer v. Hall*, 11 Ch. D. 652.]

[(*a*) *Standerer v. Hall*, 11 Ch. D. 652; see *ante*, p. 750.]

[(*b*) *Wallace v. Greenwood*, 16 Ch. D. 362; but see *Re Shaw*, 49 L. J. N. S. Ch. 213.]

4. **How she might elect to take land directed to be sold.**— Previously to the Fines and Recoveries Act, if a *feme covert* was entitled to the proceeds of land directed to be *sold*, she and her husband might have made a title to the proceeds of sale by fine (*c*); and by the same method, as it would seem, might have made themselves absolute owners, and have called for a conveyance, and by this means have elected to take the land.

5. **Fines and Recoveries Act.**— By 3 & 4 W. 4, c. 74, ss. 40, 71, 77 (*d*), a married woman is enabled, with the concurrence of her husband, and with the formalities required by the Act, to dispose of any estate at law or in equity, or any interest, charge, lien, or incumbrance in or upon lands, or money. to be laid out in a purchase of lands, or to relinquish or release any power over the same, as if she were a *feme sole*; so that in the case of money liable to be laid out in land, a *feme covert* can, through the medium of the power of disposition conferred by the Act, virtually elect to take the money.

6. **Special power of married women under Fines and Recoveries Act, over money which is an interest in land.**— And the Act enables a married woman not only to dispose of property which, though personal estate in fact, is real estate in equity, but also of property which is in equity *personal estate*, provided only it be *an interest in land*; and this, although according to the ordinary doctrines of the Court the married woman would, by reason of her interest being *reversionary*, have no such power of disposition. Thus, where real estate is devised upon trust for sale in terms amounting to a conversion out and out, and a married woman takes a share of the proceeds, she can, under the statute, dispose of her share, even though reversionary, as being an interest in land (*e*). And it is conceived that the same principle must apply to the case of a reversionary *money legacy raisable out of land*, notwithstanding the doubts entertained by Lord

(c) *May v. Roper*, 4 Sim. 360; *Hare*, 69; *Tuer v. Turner*, 20 Beav. 560; *Bowyer v. Woodman*, 3 L. R.

(d) Extended to contingent interests by 8 and 9 Vict. c. 106, s. 6. *Eq.* 313; [*Re Jakeman's Trusts*, 23 Ch. D. 344;] and see *Franks v. Bol-*

(e) *Briggs v. Chamberlain*, 11 *lans*, 3 L. R. Ch. App. 717.

Justice (then Vice-Chancellor) Knight Bruce, in the [\*956] case of *Hobby v. Collins* (*f*). \* But the Fines and Recoveries Act ceases to apply when the money has been actually raised (*a*).

[As a married woman has an absolute power of disposition over property settled to her separate use, or belonging to her as her separate property under the recent Act (*b*), she can elect to take it either as land or money as if she were *sui juris* (*c*).]

7. **A person may elect, subject to a charge.** — If A. convey an estate to a trustee in trust to sell and pay to the trustee a certain amount, and to pay the balance to A., his executors, administrators, and assigns as personalty, it is competent to A., as the person entitled subject to the *charge*, to elect to take it as realty; and if he do so, and the trustee sells after A.'s decease, the *heir* of A. will take the surplus (*d*).

8. **Remaindermen.** — How far a *remainderman* may elect, has not been definitely settled. It seems clear, so far, that the remainderman may elect for the purposes of disposition; that is, being absolutely entitled to the interest in remainder, he may deal with it by act *inter vivos*, or by will, by any denomination that he pleases; and if, therefore, in the case of money impressed with the character of land, he chooses to call it personal estate, it will pass by his will under the description of personal estate (*e*). But should the remainderman declare an intention of taking the money as personalty, and then die, in the lifetime of the tenant for life, *intestate*, will the money devolve, as between the real and personal representative, as realty or personalty? If the tenant for life call for a conversion, and the money is actually laid out on a purchase of land, it is of course too late then for the remainderman to elect to take it as money; for, as the property is now in the shape of land, the policy of the

(*f*) 4 De G. & Sm. 289; and see observations of Lord St. Leonards in his essay on the Real Property Statutes, 240.

(*a*) *Re Alge*, 2 I. R. Eq. 485.

[(*b*) 45 & 46 Vict. c. 75.]

[(*c*) *Re Davidson*, 11 Ch. D. 341.]

(*d*) *Re Gardiner's Trust*, 1 Eq. Rep. 57; *Mutlow v. Bigg*, 1 Ch. D. 385; [*Meek v. Devenish*, 6 Ch. D. 566.]

(*e*) *Lingen v. Sowray*, 1 P. Wms. 172; *Harcourt v. Seymour*, 2 Sim. N. S. 12; *Re Skeggs*, 2 De G. J. & S. 533.

law will not allow him to impress upon it the character of personality. Supposing the remainderman to elect to take the property as money, *before the actual conversion*, and then to die intestate, and after his death the tenant for life calls for a conversion, and the money is laid out in a purchase of land accordingly, it is conceived, that, as the election was made subject to another's right to call for a conversion, which right was exercised, the act of election is defeated, and the property will devolve as land (*f*). Should the remainderman elect to take the money as such, and then \*die intestate, and the tenant for life *never calls* [\*957] *for a conversion*, it may be argued, that, as the remainderman is absolutely entitled, subject to another's right to require conversion which was never exercised, the money, being still found in that shape, should be discharged from the impress of realty, and be deemed to have that character in which the remainderman was desirous of taking it (*a*). Such a doctrine, however, is open to the objection that during the life of the tenant for life the nature of the remainderman's interest, whether real or personal, would be uncertain, and dependent on the option of the tenant for life; and the principle acted upon in a recent case appears to be, that there can be no election by a person whose interest is a limited one or contingent at the time (*b*).

[9. **A person contingently entitled may elect.** — But in a more recent case, where real estate was devised to trustees upon trusts for sale, and the proceeds were, subject to a charge, given in a contingent event to the testator's son absolutely, it was held that the son could, pending the contingency, elect to take the property as realty (*c*).]

10. **Election where an estate is to be sold or money is to be laid out on land, and several parties are interested.** — Where

(*f*) *Holloway v. Radcliffe*, 23 Beav. 163. This was the case of an undivided share, but the principle was the same. But see *Re Gardiner's Trust*, 1 Eq. Rep. 57.

(*a*) See *Re Skeggs*, 2 De G. J. & Sm. 533; *Stead v. Newdigate*, 2 Mer. 531; *Gillies v. Longlands*, 4 De. G. &

Sm. 379; *Re Pedder's Settlement*, 5 De G. M. & G. 890; *Re Stewart*, 1 Sm. & G. 32.

(*b*) *Sisson v. Giles*, 3 De G. J. & S. 614; [and see *Walrond v. Rosslyn*, 11 Ch. D. 640].

[(*c*) *Meek v. Devenish*, 6 Ch. D. 566.]

an estate is directed to be sold, the proceeds to be divided amongst *several persons*, no one *singly* can elect that his own undivided share shall not be disposed of but shall remain realty (*d*), for the other undivided shares will not sell so beneficially in proportion as if the estate were entire (*e*): but if money be directed to be laid out in lands to be settled on A., B. and C., as tenants in common, any one of them may elect to take his own third as money, for two thirds may be invested just as advantageously as the whole sum (*f*).

11. **Tenant in tail may elect.**—Sound principle would require that a *tenant in tail* of lands to be purchased should not be allowed to elect, because the interests of the issue and the remainderman, who both take by title paramount, would otherwise be prejudiced. But the old rule appears to have been, that a tenant in tail might in *every case* have elected, and on filing a bill would have been entitled to the money (*g*); and the principle upon which the practice [\*958] was grounded \* was said to be, that equity will do nothing in vain, and it were useless to direct an actual purchase and settlement when the tenant in tail the next moment might dispose of the fee simple. Lord Cowper, however, in the case of *Colwal v. Shadwell* (*a*), took the distinction, that where the *remainder in fee* was not vested in the tenant in tail himself, but was limited over to a stranger, there, as the absolute fee could only be acquired by a *recovery*, which was a thing of time, and could not be suffered in *vacation*, the remainderman should not lose his chance; and as in that case the tenant in tail did actually die before the recovery was suffered, it showed the remainderman's interest in so glaring a light, that it established the precedent ever afterwards (*b*). But even then the money would

(*d*) *Holloway v. Radcliffe*, 23 Beav. 163; *Fletcher v. Ashburner*, 1 B. C. C. 500, *per* Sir T. Sewell; *Death v. Hale*, 2 Moll. 317; and see *Smith v. Claxton*, 4 Mad. 494.

(*e*) *Chalmer v. Bradley*, 1 J. & W. 59; *Holloway v. Radcliffe*, 23 Beav. 163; and see *Trower v. Knightley*, 6 Mad. 134.

(*f*) *Sceley v. Jago*, 1 P. W. 389; *Walker v. Denne*, 2 Ves. jun. 182, *per* Lord Loughborough.

(*g*) *Cunningham v. Moody*, 1 Ves. 176, *per* Lord Hardwicke.

(*a*) Cited *Chaplin v. Horner*, 1 P. W. 485.

(*b*) See *Cunningham v. Moody*, 1 Ves. 176; *Talbot v. Whitfield*, Bunb. 204.

have been decreed to the tenant in tail, provided the remainderman had waived his right and consented to the payment (c).

12. **Lord Chancellor King's doubt.** — In Eyre's case (d), Lord Chancellor King was for extending the same protection to the *issue*. "I cannot see," he said, "why I should not have the like regard to the *issue* in tail as for the *remainderman*. It is possible the tenant in tail, before he can light on a purchase and settle it, may die, leaving issue, and this is a chance of which I would not deprive such issue." And in Speaker Onslow's case (e), he declared his adherence to the same opinion. But the rule which had been established before his time (f) of paying the fund to the tenant in tail where the uses might be barred by fine, but not where they could only be barred by recovery, appears, notwithstanding his Lordship's authority, to have been revived by his successors (g).

13. **Tenant in tail may elect without suit.** — And the election of the tenant in tail need not necessarily have been made in a suit, but might have been expressed by act *in pais*, as if tenant in tail with remainder to himself had received the money of the trustee, or if tenant in tail with remainder to a stranger had received it of the trustee with the consent of the remainderman (h).

\***Observation of Lord Thurlow.** — Lord Thurlow, [\*959] indeed, once said, "If the fund be outstanding in trustees, and it is necessary to come hither in order to obtain it, the money, when obtained, will be personal property; and so it would also, if the trustees pay it without suit. That is, supposing the estate, when purchased, would be a fee simple, for it would be otherwise in case of its being an estate tail" (a).

(c) See *Trafford v. Boehm*, 3 Atk. 440, and the cases cited under note (c), p. 960.

(d) 3 P. W. 13.

(e) 3 P. W. 14, note (G).

(f) See *Benson v. Benson*, 1 P. W. 130, note (1).

(g) *Trafford v. Boehm*, 3 Atk. 447, *per* Lord Hardwicke; *Cunningham v. Moody*, 1 Ves. 176, *per eundem*;

*Binford v. Bawden*, 1 Ves. jun. 512; *Holderness v. Carmarthen*, 1 B. C. C. 382, *per* Lord Thurlow; and see the preamble of 39 & 40 G. 3, c. 56.

(h) *Trafford v. Boehm*, 3 Atk. 448; and see *Earl of Bath v. Earl of Bradford*, 2 Ves. 590; but see *Pearson v. Lane*, 17 Ves. 106.

(a) *Pulteney v. Darlington*, 1 B. C. C. 236.

But the concluding remark must have been intended (as Mr. Serjeant Hill, in a note on the passage, has justly observed (*b*)) to apply, not to every tenant in tail, as, not to tenant in tail with remainder to himself in fee, but only to tenant in tail, with remainder to a stranger; for in a subsequent case, where the tenant in tail had executed an assignment of two sums of money directed to be laid out in lands, his Lordship said, "As to the 500*l.* the assignor was tenant in tail, remainder to a stranger, remainder to himself in fee; as to the 1000*l.* he was tenant in tail, with remainder in fee to himself. I am clear, that in regard to the 1000*l.* he had the absolute dominion over it, having the immediate remainder in fee; but as to the 500*l.* I am equally clear the other way, because of the intermediate remainder" (*c*).

14. 39 & 40 G. 3, c. 56. — By 39 & 40 G. 3, c. 56 (*d*), the inability of the tenant in tail with remainders over of money to be laid out in the purchase of land to obtain possession of the money, except through the medium of a fictitious purchase (*e*), was removed; and the Court was empowered, on the petition of the first tenant in tail of such money-land, and of the parties (if any) having antecedent estates therein (with a provision for the separate examination of married women), to order the money to be paid to the petitioners or as they should appoint (*f*); so that a kind of statutory power of election was thus conferred on tenants in tail.

15. **Fines and Recoveries Act.** — By the Act for the abolition of Fines and Recoveries (*g*), a tenant in tail may, with the consent of the protector of the settlement, if any, dispose absolutely of the lands entailed *at any time, whether in term or vacation*, and by the 71st section of the statute it is enacted, that "money to be invested in the purchase of lands to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall be treated as the

(*b*) *Ib.* note (*a*), Lord Henley's edit.

(*c*) *Holderness v. Carmarthen*, 1 B. C. C. 382.

(*d*) Repealed and extended by 7 G. 4, c. 45, which in its turn was repealed by 3 & 4 W. 4, c. 74, s. 70.

(*e*) See *Henley v. Webb*, 5 Mad. 407.

(*f*) See 5 Ves. 12, note (8), as to the qualification introduced by the Court in making orders for payment under this Act.

(*g*) 3 & 4 W. 4, c. 74, s. 71.

lands to be \* purchased, and the previous clauses of [\*960] the Act shall apply to such money, as if it were directed to be laid out in the purchase of *freehold* lands, and such lands were actually purchased and settled."

16. **Whether tenant in tail of money liable to be laid out in land may still elect to take the money.** — With respect to this enactment, a doubt suggests itself whether, even at the present day, a tenant in tail, *with remainder to himself in fee*, may not elect to take in its original character money which is liable to be laid out in the purchase of lands, and declare such election either by the institution of a suit or by Act *in pais*. It is true that under the 71st clause of the late Act, the tenant in tail may at any time defeat his issue and the remaindermen by a deed executed with the proper formalities; but what is there to prevent him from exercising a power founded upon principles independent of the statute, and so acquiring the fee simple by the mere act of election? It may be said that the old rule, which made election a bar to the issue, might have been grounded on this — that, because no fine or recovery could have been levied or suffered of money (*a*), the Court, on that account, held election to have the effect of a bar, lest the tenant in tail should lose the power, which the law intended him, of defeating the settlement, but that, since by the Fines and Recoveries Act a tenant in tail of money may bar his issue and the remainderman by the same formalities as if the lands were actually purchased and settled, the same indulgence ought not now to be shown. But to this it may be answered, that the tenant in tail was allowed to elect, not because the tenant in tail of money had a right to exercise the same powers of ownership as a tenant in tail of lands, but for the purpose of avoiding circuitry. Had the former been the principle, the tenant in tail might equally have barred the remainderman as the issue; but for the destruction of remainders an actual settlement was necessary, and a sham purchase was often resorted to for the purpose (*b*).

(*a*) See *Benson v. Benson*, 1 P. W. 130; *Edwards v. Countess of Warwick*, 2 P. W. 174; *Maynwarding v. Maynwarding*, 3 Atk. 413.

(*b*) See — *v. Marsh*, cited *Chaplin v. Horner*, 1 P. W. 485, note (†); *Maynwarding v. Maynwarding*, 3 Atk. 413; *Henley v. Webb*, 5 Mad. 407.



**17. Practice of the Court as to monies paid in by railway companies.**—The practice of the Court in dealing with sums paid in by railway companies as compensation for portions of entailed land taken by them, went beyond any rule previously established, for the Court was in the habit of ordering the money to be paid to the tenant in tail without the execution

of a disentailing deed, and without enquiring who was [\*961] entitled in remainder (c). But in a \*recent case

Lord Selborne sitting for M. R. refused to order payment out of Court except on production of a disentailing deed in the ordinary way (a).

## II. How election may be manifested.

**1. How election may be made.**—The *act* of election may either be *presumed* by the Court or be *expressly declared*.

**2. Presumption,—Possession of the land.—Receipt of the money.**—The *presumption* may arise from slight circumstances of conduct (b). Thus it will be sufficient, where land is to be converted into money, if the *cestui que trust* enter into possession and take the title deeds into his own custody, for the trustees cannot recover the deeds from the *cestui que trust*, and they cannot sell without them (c); or if the *cestui que trust* merely keep the estate for a length of time unsold (d) (but in one case a period of two years was con-

(c) *Sowry v. Sowry*, 6 Jur. N. S. 337; *Re South Eastern Railway Company*, 30 Beav. 215; *Re Tyler's Estate*, 8 W. R. 540; *Nottley v. Palmer*, 1 L. R. Eq. 241; *Re Row*, 17 L. R. Eq. 300; *Re Holden*, 1 H. & M. 445 (where the amount of the fund in question was 1394*l.* Consols); *Re Watson*, 10 Jur. N. S. 1011 (in which case the Lords Justices said they could not understand how the Court could have first come to the conclusion in the face of the statute that the money could be paid out without the execution and enrolment of a disentailing deed, but the practice was useful and convenient, and saved expense). *Ex parte Maunsell*, 2 Ir. Rep. Eq. 32; *Re Wood's Settled Estates*, 20 L. R. Eq. 372.

(a) *Re Butler's Will*, 16 L. R. 479; and see *Re Broadwood's Settled Estates*, 1 Ch. D. 438; *Limerick and Ennis Railway Company Ex parte Smyth*, 10 I. R. Eq. 66; [*Re Reynolds*, 3 Ch. D. 61.]

(b) See *Pulteney v. Darlington*, 1 B. C. C. 238; *Van v. Barnett*, 19 Ves. 109; *Bradish v. Gee*, Amb. 229; *Dixon v. Gayfere*, 17 Beav. 433; [*Roberts v. Gordon*, 6 Ch. D. 531.]

(c) *Davies v. Ashford*, 15 Sim. 42; and see *Padbury v. Clark*, 2 Mac. & G. 298.

(d) See *Ashby v. Palmer*, 1 Mer. 301; *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314; *Mutlow v. Bigg*, 1 Ch. D. 385; [*Roberts v. Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. 341.]

sidered not to be sufficient indication of such intention (*e*)); or, where money is to be turned into land, if the *cestui que trust* receive the money from the trustee (*f*); but not if he merely receive the annual income though for a considerable length of time (*g*).

**3. Change of securities and trust declared for the "executors."**

— **Grant of a lease and reservation of rent to the "heirs."** — It was determined by Lord Harcourt that a *cestui que trust* had divested money of its real quality by causing the securities to be changed, and the trust to be declared to himself and his *executors*; for this, he observed, was tantamount to saying the money should *not* go to the heir (*h*); and *vice versâ*, where land was to be converted into money, it was held by Lord Hardwicke, that a lease by \* the *cestui que trust*, re- [\*962] serving a rent to her *heirs* and assigns, was evidence of an intention to continue the property as real estate (*a*).

**4. What knowledge required for election.** — To constitute an act of election it is not necessary that the person entitled, as for instance to money to be laid out in land, should know that but for the act of election it would pass as land, but it is sufficient if the Court can collect the intention that with or without such knowledge he meant the money to be dealt with and treated as money (*b*).

**5. Election expressed.** — A person may *express* his election, even by parol. This, at least, was the opinion of Lord Maclesfield (*c*), and apparently was actually decided in the case of *Chaloner v. Butcher* (*d*), in which the husband having *declared* that the money should not be laid out in land, the

(*e*) *Kirkman v. Miles*, 13 Ves. 338; *Cookson v. Cookson*, 12 Cl. & Fin. 121; and see *Brown v. Brown*, 33 Beav. 399; *Parker v. Williams*, 15 W. R. 1006; but see *Crabtree v. Bramble*, 3 Atk. 688; *Inwood v. Twyne*, 2 Eden, 148.

(*f*) *Pulteney v. Lord Darlington*, 1 B. C. C. 238, *per* Lord Thurlow; *Trafford v. Boehm*, 3 Atk. 440; and see *Rook v. Worth*, 1 Ves. 461.

(*g*) *Gillies v. Longlands*, 4 De G. & Sm. 372; and see *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*h*) *Lingen v. Sowray*, 1 P. W. 172; and see *Cookson v. Cookson*, 12 Cl. & Fin. 121; *Harcourt v. Seymour*, 2 Sim. N. S. 12.

(*a*) *Crabtree v. Bramble*, 3 Atk. 680, see 688, 689; and see *Griesbach v. Fremantle*, 17 Beav. 314.

(*b*) *Harcourt v. Seymour*, 2 Sim. N. S. 12, see p. 46.

(*c*) *Edwards v. Countess of Warwick*, 2 P. W. 174.

(*d*) *Cited Crabtree v. Bramble*, 3 Atk. 685.

Court held, that, if the question concerned the right of a third person, the declarations of the husband ought not to be admitted, but, as it was between his personal and real representative, they should be read. And both Lord Thurlow (*e*), and Lord Eldon (*f*), seem to have lent their sanction to the same doctrine, so that an *obiter dictum* of Lord Hardwicke to the contrary (*g*), though supported by so illustrious a name, must be considered as overruled.

6. **How money to be turned into land affected by cestui que trust's will.** — Where money bore the notional impress of realty, the *cestui que trust* might, until the late Wills Act, have bequeathed it as so much money to be laid out in land, and the money would have passed, though the will was not attested according to the Statute of Frauds (*h*); for the will operated first by way of election, and then by way of bequest; but now by the late Wills Act (*i*) the same formalities are required for the testamentary disposition of personal as of real estate.

[\*963]

## \* SECTION II.

THE ACT OF THE TRUSTEE SHALL NOT ALTER THE NATURE OF THE  
CESTUI QUE TRUST'S ESTATE.

1. **Power of the trustee at law and in equity.** — At *law* the trustee is the absolute owner of the land or fund, and therefore may exercise any control or dominion over it — may convert realty into personalty, or personalty into realty: but *equity*, which regards the trustee as a mere instrument for the execution of the trust, will not permit the interest of the *cestui que trust* to be affected by any act of misconduct, but, as often as any wrongful conversion is made, will transfer to the new interest the quality and character of the old —

(*e*) *Pulteney v. Darlington*, 1 B. C. C. 237.

(*f*) *Wheldale v. Partridge*, 8 Ves. 236.

(*g*) *Bradish v. Gee*, Amb. 229.

(*h*) See the cases cited, *Lechmere v. Earl of Carlisle*, 3 P. W. 221, note (C); and see *Pulteney v. Darlington*, 1 B. C. C. 235, 236; *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 343.

(*i*) 7 W. 4. & 1 Vict. c. 26.

will treat real estate as personal, and personal as real, as the circumstances of the case may require.

2. **Where the cestui que trust is sui juris.** — But although every such change in the nature of the property as is not made either in pursuance of the trust or by the authority of the beneficial owner, must in general be considered a misfeasance, the dealings of the Court (under the respective jurisdictions of *lunacy* and *chancery*), and of committees, guardians, and trustees, with the property of *lunatics* and *infants*, require particular notice.

3. **Power of the trustee where the cestui que trust is a lunatic.** — It has been laid down as a general rule in *lunacy*, that the Court will not alter the condition of the lunatic's property to the prejudice of his successors; but the maxim must be received with the qualification, *except it be for the benefit of the lunatic himself (a)*.

**The interest of the lunatic the exclusive object.** — The Chancellor takes the advice and assistance of the presumptive next of kin and presumptive heir at law in the care and management of the property (*b*); but through all the cases runs this prevailing principle — that the object of attention is exclusively and entirely the interest of the lunatic, without any regard to those who may have eventual rights of succession (*c*). If the Court considered how the representatives would be affected, there would always be among them an emulation of each other, and their speculations, if the administrator were to engage in them, would

\*mislead his attention as to the interest of the only [\*964] person he was bound to protect; there would be a continued running account between the personal and real estates; the Chancellor would be perpetually looking to the right or left, and the interest of the lunatic would be com-

(a) *Ex parte* Grimstone, cited Oxenden v. Lord Compton, 4 B. C. C. 235, note, per Lord Apsley.

(b) *Ex parte* Phillips, 19 Ves. 123, per Lord Eldon.

(c) Oxenden v. Lord Compton, 2 Ves. jun. 72; and S. C. 4 B. C. C. 233, per Lord Thurlow; and see *Ex parte*

Bromfield, 1 Ves. jun. 462; *Ex parte* Grimstone, Amb. 708; S. C. cited 2 Ves. jun. 75, note (x), and 4 B. C. C. 235, note; *Ex parte* Phillips, 19 Ves. 123; Dormer's case, 2 P. W. 265; *Ex parte* Chumley, 1 Ves. jun. 297; *Ex parte* Baker, 6 Ves. 8.

mitted in favour of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events (a).

4. **Timber cut on an estate *ex parte paternâ* applied to relief of an estate *ex parte maternâ*.** — Upon this principle, where a lunatic was seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., and the latter was subject to a mortgage, the money arising from a fall of timber upon A. was directed to be applied in discharge of the mortgage upon B.; and upon a question between the respective heirs it was held, that the representative who succeeded to A. was not entitled to any recompense from the representative who inherited B. (b).

5. **Sale of lunatic's real estate.** — So, if the lunatic be considerably indebted, and it appears that his maintenance would be better provided for, and his advantage promoted, by the sale of a real estate inconvenient and ill-conditioned, instead of exhausting the personalty, the Court, on a proper representation of the case, would have no difficulty in making an order to that effect (c).

[6. **Getting in money directed to be laid out in land.** — And where a lunatic became absolutely entitled to funds which were vested in trustees upon trust to lay them out in the purchase of land, but which were actually invested on mortgage, and the mortgage money was got in pursuant to an order in the lunacy expressing that it was for the benefit of the lunatic to call it in, and was thereafter dealt with in the lunacy with other monies admittedly personalty, it was held that the fund had been reconverted into personalty (d).]

7. **Fall of timber.** — So, timber which *ought to be cut* on a lunatic's estate may be felled by the direction of the Court, and the proceeds may either be applied to the redemption of the land-tax, or payment of debts (e), or to any other purpose which the true interest of the lunatic may require; or

(a) *Oxenden v. Lord Compton*, 2 Ves. jun. 72, 73; S. C. 4 B. C. C. 233, 234, *per* Lord Loughborough.

(b) *Ex parte Phillips*, 19 Ves. 123, *per* Lord Eldon; but see *Re Leeming*, 3 De G. F. & J. 43.

(c) *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon.

[(d) *M'Donogh v. Nolan*, 9 L. R. Ir. 262.]

(e) *Ex parte Phillips*, 19 Ves. 119; *Bevan's case*, cited *Ex parte Brom-*

if not wanted for *any* particular purpose, will go to the next of kin as personalty, and not to the heir as part of the realty (*f*).

\* 8. **Action of trespass.** — So, if it be necessary for [\*965] the interest of the real estate to bring an action of trespass, resort may be had with that object to the lunatic's personal fund (*a*).

9. **Improvements.** — By the same rule the money of the lunatic may be laid out in improvements (*b*); and the Chancellor, acting *tanquam bonus pater-familias*, may take every opportunity of ameliorating the estate by fair and ordinary means, such as draining, inclosure, &c. (*c*), erecting a steam engine for the purpose of working a coal mine (*d*), but must not engage in risks and dangerous adventures (*e*).

**Necessary expenses of real estate.** — And of course the personalty may be drawn upon for *necessary expenses*, as repairs (*f*), fines for renewal of leases, or admission to copyholds (*g*). But where the committees of a lunatic, who were entitled to the estate themselves after his death, laid out a sum in *purchasing* timber for repairs, when they ought to have cut timber on the estate, Lord Hardwicke said, that, having done so merely to serve their own interest, they should

field, 1 Ves. jun. 455, 457; *Re Mary Smith (a lunatic)*, 10 L. R. Ch. App. 84, per L. J. James.

(*f*) *Ex parte* Bromfield, 1 Ves. jun. 453; S. C. 3 B. C. C. 510; *Oxenden v. Compton*, 2 Ves. jun. 69; S. C. 4 B. C. C. 231; *Shelley's case*, cited 1 Ves. jun. 457; *Ex parte* Phillips, 19 Ves. 124, per Lord Eldon. The *dictum* in *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384, must be considered as overruled.

(*a*) *Oxenden v. Lord Compton*, 2 Ves. jun. 72; per Lord Loughborough.

(*b*) *Sergeson v. Sealey*, 2 Atk. 414, per Lord Hardwicke; *Dormer's case*, 2 P. W. 202; [*Re Gist*, 5 Ch. D. 881.]

(*c*) See Justice De Grey's argument in *Ex parte* Grimstone, cited *Oxenden v. Lord Compton*, 2 Ves. jun. 75, note.

(*d*) *Oxenden v. Lord Compton*, 2 Ves. jun. 73.

(*e*) *Ib.* per Lord Loughborough.

(*f*) *Sergeson v. Sealey*, 2 Atk. 414, per Lord Hardwicke; *Ex parte* Grimstone, Amb. 708; S. C. cited *Oxenden v. Lord Compton*, 4 B. C. C. 237, note, per Lord Apsley; 2 Ves. jun. 72, per Lord Loughborough; *Newport's case*, cited *Ib.*; [*Re Gist*, 5 Ch. D. 881;] *Re Badcock*, 4 M. & Cr. 440. But it was said in the last case, that "if the money were laid out in a purchase of land, or, what was the same thing, in building a farm house, it would be right that the sum so laid out should retain its character of personalty."

(*g*) Justice De Grey's argument in *Ex parte* Grimstone, *ubi supra*; but see *Degg's case*, cited *Oxenden v. Lord Compton*, 4 B. C. C. 235, note.

make good the disbursement to the lunatic's next of kin (*h*).

10. **Conversion not allowed, except where it is clearly for the lunatic's benefit.** — In the preceding cases the conversion has been for the clear benefit of the lunatic, but in general the Court will not lightly change the condition of the property, but will only act on pressing and urgent occasions (*i*): it will interfere with great caution, and do nothing that is unnecessary or uncalled for (*j*). The Court will not *buy and sell* for the lunatic (*k*); and, therefore, if the committee of a lunatic wantonly, and of his own head, lay [\*966] out money upon \*land, or turn land into money, the Court will not suffer such fraudulent management to affect the rights of the representatives (*a*), but will transfer to the heir what ought to have remained real estate, and to the next of kin what ought to have remained personal estate (*b*). [So, where a lunatic was tenant in tail in possession of large estates, upon which it was desirable to expend a considerable sum for repairs and improvements, and he was also entitled to a fund in Court sufficient for the required outlay, it was held that the expenses of the repairs and improvements on the settled estates ought to be raised by mortgage or charge of those estates, and that the fund in Court ought not to be applied for the purpose (*c*).]

**Personal estate applied to relief of real estate.** — So, where a mortgage upon the lands of a lunatic is discharged out of his personal estate, though it was formerly held that the next of kin after the lunatic's decease had no *lien* upon the real estate for the amount expended (*d*), it has since been ruled

(*h*) *Ex parte* Ludlow, 3 Atk. 407.

(*i*) *Ex parte* Bromfield, 1 Ves. jun. 463, and 3 B. C. C. 515, *per* Lord Thurlow; and see *Re Mary Smith (a lunatic)*, 10 L. R. Ch. App. 79.

(*j*) *Oxenden v. Lord Compton*, 2 Ves. jun. 76, and 4 B. C. C. 238, *per* Lord Loughborough.

(*k*) *Oxenden v. Lord Compton*, 2 Ves. jun. 73, *per* Lord Loughborough; *Ex parte* Grimstone, cited in *Oxenden v. Lord Compton*, 4 B. C. C. 235, note,

*per* Lord Apsley; *Sergeson v. Sealey*, 2 Atk. 414, *per* Lord Hardwicke.

(*a*) See *Ex parte* Bromfield, 1 Ves. jun. 462.

(*b*) *Anon. case*, 2 Freem. 114; *Awdley v. Awdley*, 2 Vern. 292; *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384, *per* Lord Hardwicke; and see *Re Badcock*, 4 M. & Cr. 440.

[(*c*) *Re Gist*, 5 Ch. D. 881.]

(*d*) *Ex parte* Grimstone, Amb.

that the personal estate after the lunatic's death shall be recouped the amount expended in exonerating the real estate (*e*).

[**Transfer of mortgage should be taken.**—And where a mortgage of a lunatic's real or leasehold property is paid off out of his personal estate the mortgage should not be re-conveyed to the lunatic, but should be kept on foot by transferring it to the committee, to be disposed of as the Court may direct, so as to leave open the question how the mortgage debt should ultimately be borne (*f*).] However, if timber be cut down, not by a committee in breach of his duty, but by a stranger tortiously, then, as there is no abuse of confidence, the heir has no equity, and the property of the timber, like a windfall, will belong to the executor (*g*).

[11. **Right of customary heir preserved in equity on enfranchisement.**—Where a copyhold estate, as to which the rules of descent were different from those of freeholds, was enfranchised, the Court inserted a declaration in the order sanctioning the enfranchisement, carrying over the equitable interest in the enfranchised property, in the event of the lunatic dying intestate, to the persons who would have taken it if it had not been enfranchised (*h*). So where part of the personal estate of the lunatic was laid out in the purchase of real estate as a convenient mode of investment, a declaration was inserted in the conveyance in conformity with the terms of the order, that the premises granted were to all intents and purposes to be considered as part of the personal estate of the lunatic; and this was held to be sufficient to cause the property to retain its character of personality though invested in land, and to make the land subject to probate duty on the death of the lunatic.<sup>1</sup>

786; S. C. cited *Oxenden v. Compton*, 4 B. C. C. 235, and *Weld v. Tew*, Beat. 272.

(*e*) *Weld v. Tew*, Beat. 266; *Re Leeming*, 3 De G. F. & J. 43.

[(*f*) *Re Melly*, 49 L. T. N. S. 429.]

(*g*) Anon. case, cited *Ex parte Bromfield*, 1 Ves. jun. 462, and 3 B. C. C. 515, *per* Lord Thurlow.

[(*h*) *Re H. D. Ryder*, 20 Ch. D. 514.]

<sup>1</sup> *Attorney-General v. Marquess of Ailesbury*, 14 Q. B. D. 895.



12. **Out of what fund lunatic to be maintained.** — Where property is vested in trustees in trust to apply the income for the maintenance of a lunatic during his life, and any surplus income not required is to be *accumulated as* [\*967] *capital*, and \*the lunatic is absolutely entitled to other property, the Court will apply the life interest, in the first place, towards his maintenance, unless the trustees of the settled property have an absolute discretion whether they will apply the whole or any part of the income for the lunatic's benefit, in which case the exercise of such discretion will not be interfered with (*a*).]

Next as to *infants*.

1. **Infants distinguished from lunatics.** — Lord Thurlow, on one occasion, but without having examined the authorities, said he could not distinguish between lunatics and infants (*b*); but, when the matter came on again, and he had maturely considered the subject, he never once hinted at the existence of such a doctrine (*c*); and, indeed, until the late Wills Act there was a very broad distinction between the two cases; for, if a *lunatic* recovered, which in contemplation of law is always possible, he had precisely the same power of disposition, though by different modes, over one species of property as over the other (*d*); but an *infant*, while he could have bequeathed personal estate under the age of twenty-one, could not have devised a freehold until he had attained that age (*e*). The Court, therefore, would not allow an infant's estate to be converted from one species of property into another, not from any tenderness to the rights of the representatives, but from a regard to the circumstances and capacity of the infant himself. Should his money have been turned into land, he would have lost a power of disposition which the law permitted him to exercise: should land have been turned into money, he would indirectly have

[(*a*) *Re Weaver*, 21 Ch. D. 615.]

(*b*) *Ex parte Bromfield*, 1 Ves. jun. 461; S. C. 3 B. C. C. 515.

(*c*) *Oxenden v. Lord Compton*, 2 Ves. jun. 69; S. C. 4 B. C. C. 231.

(*d*) See *Ex parte Phillips*, 19 Ves. 123.

(*e*) See *Earl of Winchelsea v. Norcliffe*, 1 Vern. 437, in which case the distinction appears first to have been noticed.

gained a power which the policy of the law had forbidden him (*f*).

2. **Timber cut on an infant's estate.**— Upon the same principle, had timber been cut on an infant's estate, the proceeds, and, it seems, the accumulation of the proceeds (*g*), would have continued part of the realty, and have descended to the heir (*h*). But a distinction was taken in *Mason v. Mason* (*a*), (and Sir Thomas Clarke said [\*968] he allowed it (*b*),) between the case of an infant tenant in fee and an infant tenant in tail: that in the former case the proceeds of the timber should be taken as realty, inasmuch as the infant was thus at all events absolutely entitled; but in the latter case, as the proceeds might, if impressed with the character of realty, become vested in the remainderman, the Court would treat the fund as personalty, and give it to the infant's executors.

3. **Exoneration of infant's real estate out of his personal estate.**— Again, if an infant's money had been applied to pay off a charge, or redeem a mortgage affecting his real estate, it was the better opinion (though some old authorities were against it), that the sum so invested would still be looked upon as part of the personalty (*c*).

4. **Necessary expenses.**— But *necessary expenses*, though affecting the infant's *lands*, were allowed to be thrown upon

(*f*) *Ware v. Polhill*, 11 Ves. 278, and *Ex parte Phillips*, 19 Ves. 122, *per* Lord Eldon; *Ashburton v. Ashburton*, 6 Ves. 6; *Sergeson v. Sealey*, 2 Atk. 413; and *Rook v. Worth*, 1 Ves. 461, *per* Lord Hardwicke; *Witter v. Witter*, 3 P. W. 99; but see *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435; *Inwood v. Twyne*, 2 Eden, 152; *Ex parte Bromfield*, 1 Ves. jun. 461.

(*g*) See *Ex parte Bromfield*, 1 Ves. jun. 454.

(*h*) *Tullet v. Tullet*, 1 Dick. 322; *S. C. Amb.* 370; *Mason v. Mason*, cited, *Ib.* 371; *Ex parte Phillips*, 19 Ves. 124, *per* Lord Eldon; and see *Rook v. Worth*, 1 Ves. 461; but see *Ex parte Bromfield*, 3 B. C. C. 516.

(*a*) *Ubi supra*.

(*b*) *Tullet v. Tullet*, Amb. 371; and see *Dyer v. Dyer*, 34 Beav. 504; *Attorney-General v. Marquess of Ailesbury*, 14 Q. B. D. 895.

(*c*) *Ex parte Bromfield*, 3 B. C. C. 516, *per* Lord Thurlow; *Tullet v. Tullet*, 1 Dick. 323, *per* Sir T. Clarke; *Seys v. Price*, 9 Mod. 220, *per* Lord Hardwicke; *Dowling v. Belton*, 1 Flan. & Kelly, 462; but see 2 Freem. 114, c. 126; *Ex parte Grimstone*, Amb. 708; *Palmes v. Danby*, Pr. Ch. 137; *Zoach v. Lloyd*, cited *Awdley v. Awdley*, 2 Vern. 192; as to *Dennis v. Badd*, cited *Ib.* 193, see *Earl of Winchelsea v. Norcliffe*, 1 Vern. 436.

the personal fund, as disbursements for repairs (*d*), for keeping up a house, &c. (*e*).

5. So, in *Vernon v. Vernon* (*f*), where an estate was devised to an infant in consideration of his paying the sum which the original purchase had cost, it was held, that the amount, being a *necessary* outlay, had properly fallen upon the personalty, and the next of kin were not entitled to compensation.

6. **Exceptions from the general rule.**—There were some cases to which the reason for preserving the original character of the property did not apply. Thus, if an infant was seised of a lease for lives *ex parte maternâ*, and the guardian procured a new lease to be granted to the infant and his heirs, whereby the old lease was merged, the substituted lease would not descend in the maternal line, but, as a new acquisition, would go to the heirs on the part of the father (*g*); for it being perfectly immaterial to the infant himself whether the *seisin* was in the paternal or maternal line, the representative *ex parte maternâ* had no equity against the representative *ex parte paternâ*.

[7. **Repairs.** — Where repairs are absolutely necessary for the protection of an infant's property the Court has [\*969] jurisdiction to direct the raising \* of the necessary funds by mortgage or sale of part of the infant's property (*a*). But the jurisdiction should be jealously exercised and only in cases which amount to actual salvage (*b*).]

8. **Effect of late Wills Act.** — By the late Wills Act (*c*), an infant has no greater testamentary power over personal than over real estate; and it remains to be seen how far the removal of the ground, so frequently relied upon, against permitting the conversion of the personal estate of an infant into realty, can be treated as having diminished the rights

(*d*) *Ex parte Grimstone*, cited *Oxenden v. Lord Compton*, 4 B. C. C. 235, note, *per* Lord Apsley.

(*e*) *Ex parte Grimstone*, Amb. 708, *per eundem*.

(*f*) Cited in *Ex parte Bromfield*, 1 Ves. jun. 456.

(*g*) *Mason v. Day*, Pr. Ch. 319; *Pierson v. Shore*, 1 Atk. 480.

[(*a*) *Re Jackson*, 21 Ch. D. 786; *Glover v. Barlow*, 21 Ch. D. 788, note.]

[(*b*) *Per Kay J., Re Jackson, ubi supra.*]

(*c*) 7 W. 4, & 1 Vict. c. 26.

of the next of kin, or as authorising the application of the decisions in lunacy to the administration of the property of infants

9. The leaning of the Courts would appear to be to simplify the law by assimilating the case of infants to that of lunatics. Thus in a late case (*d*) an estate was devised to an infant, his heirs and assigns, with a limitation over on his dying under twenty-one, and timber was cut on the estate during the infancy with the sanction of the Court. The infant died without attaining his age, and the question was whether the proceeds belonged to the infant's personal representative, or should go with the estate to the person entitled under the limitation over, and Sir J. Romilly, M. R. held it to be personalty, and evidently made no distinction between infancy and lunacy.

(*d*) *Dyer v. Dyer*, 34 Beav. 504. estate; *Field v. Brown*, 27 Beav. 90; But if an estate be settled upon A. unless the order be made upon the for life only, with remainders over, application of a remainderman entitled in fee-simple, subject to the and the Court cuts the timber for the benefit of all parties interested, prior estate; *Phillips v. Daycock*, W. N. 1867, p. 54. the proceeds will go along with the

## PRACTICE.

## CHAPTER XXXII.

In this chapter we propose to consider such parts only of the practice of the Court as most materially affect trustees and their *cestuis que trust*, and are capable of being compressed within reasonable limits, viz.—*First*, Distringas; *Secondly*, Production of documents; *Thirdly*, Compulsory payment into Court; *Fourthly*, Receivership; and *Fifthly*, Costs of suit (a).

## SECTION I.

OF DISTINGAS.<sup>1</sup>

1. **Danger to which stock, &c., exposed in consequence of legal title only being recognised.**—In the case of stock transferable in the books of the Bank of England, and also in the case of the stocks and shares of many other public companies, no obligation exists on the part of the bank or public company to look beyond the title of the legal holder. The modern

[(a) In the sixth and earlier editions of this work, the subjects of parties to suits relating to trusts, and of the order and manner in which trustees and *cestuis que trust* ought to sue

or be sued have been considered at some length, but in referring to those editions the recent changes in the practice of the Court must be borne in mind.]

<sup>1</sup> Trustees Phillips Academy v. King, 12 Mass. 546; McDonogh v. Murdoch, 15 How. 367; Dublin Case, 38 N. H. 577; Att'y Gen. v. Utica Ins. Co. 2 Johns. Ch. 384; Greenville Academies, *Ex parte*, 7 Rich. Eq. 476.

form of legislative enactment on the subject is usually to the effect that the company "shall not be bound to see to the execution of any trust, whether express, implied, or 'constructive'" (*b*). \* Where, therefore, property [\*971] of this description is held upon trust, the interests of the *cestui que trust* are peculiarly liable to be endangered by the dishonesty of the trustee; and, indeed, but for the means of protection now about to be explained, would be almost entirely at his mercy.

2. **Origin of the writ of *distringas*.**—The *distringas* was originally a process of the equity side (afterwards abolished) of the Court of Exchequer for compelling the appearance of a corporation to a bill filed, but formerly it was a common practice, more particularly in any emergency, to issue a subpoena before the bill was actually on the file. When, therefore, a party sought to restrain a transfer of stock, before he filed the bill against the holder of stock and the bank (which was then a necessary party), to prevent any mischief in the interim, he served process immediately on the secretary of the bank to appear to the bill. But as the form of *distringas* gave no information as to the stock to be restrained, the *distringas* was accompanied with a notice in writing, which specified the stock, and required the bank not to permit the transfer. The effect of this was, that if the holder of the stock applied to the bank to make a transfer, the bank immediately forwarded a notice to the party issuing the *distringas*, that unless he actually filed a bill, and obtained and served an injunction before a certain day, they should permit the transfer to be made.

3. **Practice continued notwithstanding 4 Anne, c. 16, and 39 & 40 G. 3, c. 36.**—The 4 Anne, c. 16, s. 22, declared that no *subpœna* or other process for appearance should issue until after the bill was filed; and the 39 & 40 G. 3, c. 36, enabled suitors to obtain an injunction against the bank, without making the bank a party. However, in practice the *distringas* still continued to be served on the bank, and the same attention was paid to it in not allowing a transfer.

(*b*) 8 Vict. c. 16, s. 20; and see 25 & 26 Vict. c. 89, s. 30.

4. **Process transferred to Chancery on the abolition of the equity Exchequer.** — The convenience of the *distringas* was so sensibly felt, from the frequent necessity of laying an embargo upon stock at a moment's notice, that when 5 Vict. c. 5, abolished the equity side of the Exchequer, it was thought expedient to transfer the process to the Court of Chancery, and enlarge the remedy.

5. **Additional remedy given by 5 Vict. c. 5, s. 4.** — Accordingly, by section 4 of the Act referred to, it was by way of additional remedy enacted, that “it should be lawful for the Court of Chancery, upon the application of *any party interested by motion or petition*, in a summary way, *without bill filed*, to restrain the Bank of England or other company, whether incorporated or not, from permitting the transfer of any stock in the public funds, or *any stock or shares in any public company*, or from paying any dividend or dividends due or to become due thereon; and every [\*972] \*order of the Court upon such motion or petition should specify the *amount of the stock*, or the particular shares to be affected thereby, and the *name or names of the person or persons, body politic or corporate, in which the same should be standing.*”

6. **Practice under the 4th section.** — An application to the Court under this section must be founded upon an affidavit verifying the special grounds upon which it proceeds (*a*). And when the order has been made, as it was not the intention of the Legislature to do more than protect the stock until the party could assert his right in the ordinary way, if the opposite party move to dissolve the injunction, and the Court sees that there has been great neglect on the part of the person who obtained the order, and that any extension of time would be oppressive to the party restrained, it will not as of course give further time for instituting proceedings (*b*). Under the former practice, when a bill had been filed, and an answer put in, and the defendant moved to discharge the re-

(*a*) *Ex parte Field*, 1 Y. & C. C. C. 1; *Re Marquis of Hertford*, 1 Hare, 586; *Re Locke and others*, 18 W. R. 275.

(*b*) *Re Marquis of Hertford*, 1 Hare, 584; see same case, 1 Ph. 203.

straining order, the plaintiff was allowed to file affidavits in opposition to the answer, and was not confined to the merits disclosed in the answer (*c*).

7. **Transfer of the old writ of distringas.** — By section 5 of the Act it is thus enacted: "In the place and stead of the Writ of Distringas, as the same has been heretofore issued from the Court of Exchequer, a Writ of Distringas in the form set out in the schedule to the Act shall be issuable from the Court of Chancery, and shall be sealed at the subpœna office, and the force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the said Court of Exchequer: Provided, nevertheless, that such writ, and the practice under or relating to the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of this Act, or of any other Act now in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the Court of Chancery."

**Form of new writ.** — In the Schedule to the Act, the form of the writ is as follows: "Victoria, &c., to the Sheriffs of London greeting. We command you that you omit not, by reason of any liberty, but that you enter the same, and distrain the *Governor and Company of the Bank of England*, by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until We otherwise \*command you; and that you answer us the [\*973] issue of the said lands, *so that they do appear before us in our High Court of Chancery on the                      day of                      , to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by                      complainant*; and, further, to do and receive what our said Court shall then and there order in the premises, and that you then leave there this writ. Witness," &c.

8. **Orders of Court regulating practice.** — [Notice substituted for the writ.] — The Act, as we have seen, empowered the

(c) *Ib.* 1 Ph. 203; and see 15 & 16 Vict. c. 86, s. 59.



Court to regulate the practice of the *distringas*, and orders [were accordingly issued with that object (*a*); but the writ of *distringas* has now been superseded (*b*), and a notice substituted in its place, which is made to apply, not only to the Bank of England, but to all companies, whether incorporated or not, and the practice in relation to such notices is now regulated by Order 46, rules 2-10, of the Rules of the Supreme Court, 1883.

[9. **Present practice as to obtaining and serving the notice in lieu of *distringas*.** — The present course is as follows: — The party seeking the benefit of the Act prepares a notice, and makes an affidavit in the forms prescribed by the general order. The notice and affidavit are then filed in the Central Office, and an office copy of the affidavit and a duplicate of the notice, authenticated by the seal of the Central Office, are obtained and served on the bank or company; and such service has the same force and effect against the bank or company, as a writ of *distringas* duly issued under the 5th section of the Act previously had.

The notice may be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by an order made upon notice on the application of any other person claiming to be interested.

If while the notice continues in force the bank or company receive from the person in whose name the stock is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred, or to pay the dividends thereon, the bank or company is not by force or in consequence of the service of the notice, authorised without the order of the Court or a judge to refuse to permit the transfer to be made, or to withhold the payment of the dividends, for more than eight days after the date of the request.] The result is, that when the holder of the stock requests a transfer of the stock or payment [\*974] \* of the dividends, the bank [or company] immedi-

(*a*) XXVII Cons. Ord. 1860. See Orders, 17 Nov. 1841, 3 Beav. xxxiii.; and 10 Dec. 1841, 3 Beav. xxxviii.

[(*b*) See Rules of the Supreme Court Ord. 46, superseding the similar Rules of April, 1880.]

ately forwards a notice to the party who served the notice, that unless he bring an action, and obtain and serve an injunction within eight days from the date of such request, the transfer or payment will be made. The party must, of course, be then upon the alert to take proceedings and obtain and serve the injunction before the eight days have expired (*a*).

10. **Distinctions between remedies under the 4th & 5th sections of the act.** — [Until the issuing of the Order of April, 1880, it was considered that while the 4th section of the Act applied,] not merely to stock in the funds, but to stock and shares of *public companies*, whether incorporated or not, the 5th section was by the joint effect of the schedule to the Act of Parliament and of the orders of Court before referred to (*b*), confined to stock transferable at the *Bank of England*, [but this distinction between cases under the 4th and 5th sections has been superseded, and by the recent Order, rule 3, the notice is applicable to any public company, whether incorporated or not, and may affect shares, securities, and money, as well as stock. The distinction, however, still remains that notice] under the 5th section may be, and is in fact, frequently obtained, not from any fear of immediate danger, but as a general safeguard merely (*c*); whereas a special case must be made in order to obtain a restraining order under the 4th section (*d*).

11. **Both remedies available in the case of stock.** — The [notice in lieu of] *distringas* under the 5th section, and the restraining order under the 4th section, may both occasionally be resorted to should circumstances require it; for the adoption of either remedy is not an election of the one to the exclusion of the other (*e*). “The 4th clause,” said Sir J. Wigram, “was intended for interim purposes, — to protect stock until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way,

[*(a)* The proper course is to obtain an interim order, *ex parte*, over the next motion day, which must be served on the legal owners of the stock; *Re Blaksley's Trusts*, 23 Ch. D. 549.]

[*(b)* See note (*a*), p. 973.]

[*(c)* See *Etty v. Bridges*, 1 Y. & C. C. C. 486.

[*(d)* Note (*a*), p. 972, *supra*.

[*(e)* *Re Marquis of Hertford*, 1 Hare, 584; 1 Ph. 129.

—an opportunity often wanting from the facility with which that species of property is transferred from hand to hand, and which the common *distringas*, preserved by the 5th section, does not in all cases afford. A *distringas* remains (*f*) only at the discretion of the bank. The restraining order, which the 4th section enables the Court to grant, is imperative; it continues so long as the Court sees fit to direct, and can only be discharged in the meantime upon [\*975] the application of the parties interested.” \* “Cases might arise,” he added, “in which, from the discovery of new matter, after a *distringas* had issued, or from the bank peremptorily but erroneously refusing to notice a *distringas*, or perhaps from other causes, the party who obtained that writ might, notwithstanding, upon a full disclosure of the facts in a case of merits and urgency, entitle himself to a restraining order under the 4th section” (*a*).

## SECTION II.

### OF PRODUCTION.

1. **General rule.** — All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners (*b*).

**Cases for opinion.** — And if the trustee has submitted cases to counsel and taken opinions, not for the purpose of defence in any litigation between himself and his *cestuis que trust*, but for his guidance as trustee, he is bound to produce them to the *cestuis que trust*, who pay the expense so incurred by the trustee (*c*). [So, in a suit by *cestuis que trust* against their trustees to compel them to make good a breach of trust, the trustees are bound to produce letters and copies of letters between them and their solicitors in relation to the matters in question in the action *ante litem motam* (*d*).]

(*f*) *Sic*, qu. “restrains.”

(*a*) *Re Marquis of Hertford*, 1 Hare, 590.

(*b*) *Simpson v. Bathurst*, 5 L. R. Ch. App. 202, *per* Lord Hatherly.

(*c*) *Wynne v. Humberston*, 27

Beav. 421; *Devaynes v. Robinson*, 20 Beav. 42; *Talbot v. Marshfield*, 2

Dr. & Sm. 285, 549.

[(*d*) *Re Mason*, 22 Ch. D. 609.]

**Parties.**— But as all the *cestuis que trust* have an interest in the documents, they must all be represented, directly or indirectly, in the suit before the documents can be finally dealt with (*e*). If the trust documents include mortgages upon which the trust fund has been invested, the production cannot be objected to on the ground that the mortgagors, or persons entitled to the equity of redemption, are not parties (*f*).

2. **Trust must be established.**— The privilege of requiring production can be asserted only by a *cestui que trust* when the relationship of trustee and *cestui que trust* has been established; for, so long as the claim is disputed, the would be *cestui que trust* is regarded as a stranger (*g*).<sup>1</sup>

3. **Accounts.**— An executor and trustee is bound to keep clear and distinct \* accounts, and if he enter [\*976] the accounts of the trust in his private books, he is bound to produce them (*a*); and if an executor or trustee, being a partner, be allowed to enter the trust accounts in the partnership books, the Court will not allow the partners to withhold the inspection (*b*); but if an agent be employed to manage an estate, and he keeps the accounts in the same books in which the accounts relating to the estates of other persons are kept, the production, in the absence of those other persons, has been refused (*c*).

4. **Privileged communications.**— Where litigation is pending or is contemplated between the trustee and his *cestui que trust*, and the trustee submits a case to counsel for his opinion, for the protection of the trustee himself adversely to the *cestui que trust*, the case and opinion are communications within the general rule, and privileged from production (*d*).

(*e*) Bugden v. Tylee, 21 Beav. 545.

(*f*) Gough v. Offley, 5 De G. & Sm. 653.

(*g*) Wynne v. Humberston, 27 Beav. 421.

(*a*) Freeman v. Fairlie, 3 Mer. 43, — per Lord Eldon.

(*b*) Ib.

(*c*) Airey v. Hall, 12 Jur. 1043.

(*d*) Talbot v. Marshfield, 2 Dr. & Sm. 285, 549; Brown v. Oakshot, 12

<sup>1</sup> If a trustee does not keep clear, intelligible, and plain accounts, any doubtful points or questions will be decided adversely to him; Blauvelt v. Ackerman, 23 N. J. Eq. 493.

5. **Persons bound by notice of the trust.** — The right of the *cestui que trust* is enforced not only as against the trustee personally, but as against all claiming under him, and though for value, if with notice of the trust (*e*).

### SECTION III.

#### OF COMPULSORY PAYMENT INTO COURT.<sup>1</sup>

1. **General rule.** — The general rule as laid down by Lord Eldon, and which has ever since been acquiesced in, is, that to call for payment of money into Court, “the plaintiff must either be *solely entitled* to the fund or *have acquired in the whole of the fund such an interest, together with others, as entitles him on his own behalf, and the behalf of those others, to have the fund secured in Court*” (*f*). It is not indispensable that the plaintiff should be the person exclusively interested; for if he have a partial or contingent interest (*g*), it is enough, provided all the other persons interested in the fund are before the Court (*h*); and occasionally the Court will make orders for payment into Court, although [\*977] some of the persons interested in the money are \*not

Beav. 252; *Devaynes v. Robinson*, 20 Beav. 42; *Bacon v. Bacon*, W. N. 1876, p. 96; [see *Re Mason*, 22 Ch. D. 609; *Mayor and Corporation of Bristol v. Cox*, 26 Ch. D. 678.]

(*e*) *Smith v. Barnes*, 1 L. R. Eq. 65.

(*f*) *Freeman v. Fairlie*, 3 Mer. 29; and see *Dubless v. Flint*, 4 M. & Cr. 502; *M’Hardy v. Hitchcock*, 11 Beav. 77.

(*g*) *Ross v. Ross*, 12 Beav. 89.

(*h*) *Whitmarsh v. Robertson*, 4 Beav. 26; *Bartlett v. Bartlett*, 4 Hare, 631.

<sup>1</sup> If a trustee fails to pay money into court as ordered, he is liable for the principal, and compound interest, during such failure; *Lathrop v. Smalley’s Ex.* 23 N. J. 192; *Winder v. Diffenderffer*, 2 Bland, 166; *McElhenny’s App.* 46 Pa. St. 347; *Durling v. Hammar*, 5 C. E. Green, 220. When the trustee does pay the fund into the court, either voluntarily or involuntarily, no interest can be claimed from him since such payment; *Young v. Brush*, 38 Barb. 294; *Lane’s App.* 24 Pa. St. 487; *Brandon v. Hoggatt*, 32 Miss. 335. There can be no objection to the payment of the money into court by the trustee, if he chooses to do it; *Smith v. Atwood*, 14 Ga. 402; *Wright v. Arnold*, 14 B. Mon. 638. If a trustee has been guilty of misconduct, he will be ordered to pay the funds into court; *Hosack v. Rogers*, 9 Paige, 468; *Contee v. Dawson*, 2 Bland, 264; but a clear case and good reason must be shown to induce courts to make such an order; *McTighe v. Dean*, 7 C. E. Green, 81.

before it (*a*), or the defendant does not *admit* that all are before it (*b*). Where the other persons interested are not necessary parties to the suit, payment into Court, if consistent with the relief sought in the suit, may be obtained without service on them of the notice of motion (*c*); but where *cestuis que trust* had been served with the copy of a bill which prayed the appointment of new trustees, and a transfer of the fund not into Court but *to the new trustees*, the Court held that the parties served with a copy of the bill must be served with notice of the motion to transfer the fund into Court (*d*).

2. **Plaintiff may move upon a possible title.** — If the defendant admits himself to be a trustee for some one, but it remains to be ascertained whether he is a trustee for the plaintiff or for other parties, the plaintiff may move upon his possible title, where all persons are before the Court among whom there will be found some one who is entitled (*e*). “In a contest as to the title to any particular property,” said Lord Cottenham, “the Court will, in some cases, take possession of the subject-matter of the contest for security until it adjudicates upon the right. Such cases generally arise when the property is in the hands of stakeholders, factors, or trustees who do not themselves claim any title to it. In ordering money into Court under such circumstances, the Court does not disturb the possession of any party claiming title, or direct a payment before the liability to pay is established” (*f*).

3. **Payment of a share.** — Occasionally, where the fund is clear, and is divisible between the plaintiff and defendant in certain proportions, the Court has ordered the defendant to pay into Court the share only of the plaintiff (*g*).

(*a*) *Wilton v. Hill*, 2 De G. M. & G. 807; *Hamond v. Walker*, 3 Jur. N. S. 686.

(*b*) *Symonds v. Jenkins*; 34 L. T. N. S. 277; 24 W. R. 512.

(*c*) *Marryatt v. Marryatt*, 23 L. J. N. S. Ch. 876.

(*d*) *Lewellin v. Cobbold*, 1 Sm. & G. 572.

(*e*) See *Dolder v. Bank of England*, 10 Ves. 355; *Whitmore v. Turquand*, 1 J. & H. 296; but see *Dubless v. Flint*, 4 M. & Cr. 502; *M'Hardy v. Hitchcock*, 11 Beav. 73.

(*f*) *Richardson v. Bank of England*, 4 M. & Cr. 171.

(*g*) *Rogers v. Rogers*, 1 Anst. 174; *Hamond v. Walker*, 3 Jur. N. S. 686; see *Score v. Ford*, 7 Beav. 336.

4. **Motion formerly must have been founded on admission in defendant's answer.**— [It was formerly the rule of the Court that where the motion was made before decree the merits upon which it was] founded must be admitted by the defendant's answer, and that no evidence as to merits could be adduced *aliunde* (*h*). Thus if money was [\*978] \*standing in the joint names of several persons as of three trustees, it would not be ordered into Court on the admission of the specific sum by one, though the others admitted that a sum was standing in their joint names, and the plaintiff offered to read affidavits sworn by them from which the amount of the sum would appear (*a*).

[**But now any admission direct or implied sufficient.**— But in a recent case (*b*) the Court of Appeal intimated an opinion that any admission, whether direct or implied, would be sufficient to enable the Court to act; and in a subsequent case, where a motion was made in an administration action, after the defendant's appearance but before any pleadings had been delivered, for payment into Court of sums of money alleged to be in the defendant's hands, and the motion was supported by the affidavit of the plaintiff, but the defendant though served with notice of the motion did not appear, it was held by the late M. R. that the defendant must be taken to have admitted that he had received the money as he had not denied it, and he was ordered to pay the amount into Court (*c*); and admissions by a trustee in correspondence that he has received the money, and a recital

(*h*) *Beaumont v. Meredith*, 3 V. & B. 181, *per* Lord Eldon; *Richardson v. Bank of England*, 4 M. & Cr. 171, 175, *per* Lord Cottenham; *Dubless v. Flint*, 4 M. & Cr. 502; *Black v. Creighton*, 2 Moll. 554, *per* Sir A. Hart; and see *Green v. Pledger*, 3 Hare, 171; *Hagell v. Currie*, 2 L. R. Ch. App. 452. [However in *Jervis v. White*, 6 Ves. 738, Lord Eldon took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands and an affidavit of the defendant before answer together as an admission, and ordered the money

into Court.] The 59th sect. of 15 & 16 Vict. c. 86, directing the defendant's answer to be viewed merely as an affidavit in motions for injunction or receiver, &c., did not touch motions for payment into Court.

(*a*) *Boschetti v. Power*, 8 Beav. 98.

[(*b*) *London Syndicate v. Lord*, 8 Ch. D. 84.]

[(*c*) *Freeman v. Cox*, 8 Ch. D. 148. In a recent case in Ireland, *V. C. Chatterton* declined to follow *Freeman v. Cox*; see *Nesbitt v. Baldwin*, 7 L. R. Ir. 134.]

to that effect in the settlement which was executed by him, are sufficient to found the order (d).]

5. **Old rule that answer should contain an admission of plaintiff's title.** — And it would seem that [the old rule was that] not only must the plaintiff have been able to read from the answer an admission of the defendant's receipt of the money, but also an admission of his own title, or probable title, *e.g.* as next of kin, heir-at-law, &c., and that if the defendant ignored the plaintiff's title, the money would not have been ordered into Court (e). But in a suit to establish a constructive trust, the rights of the plaintiff might have appeared so clear upon the answer, that the Court, notwithstanding a formal denial by the defendant that he was a trustee, would have felt itself justified in ordering payment (f).

[**Present practice.** — It is conceived that under the present practice any admission by the defendant of the plaintiff's title, whether expressed or implied \*from [\*979] his conduct, would be sufficient to enable the Court to order money into Court (a).

6. **Payment in after decree.** — Where the motion is made after decree the Court will order money into Court in any case where it is ascertained to its satisfaction, that the amount must in any event be ultimately payable by the defendant, and if the certificate of the chief clerk has not been made finding the amount due, the Court will in a proper case satisfy itself by an examination of the evidence as to the amount, and order payment of the amount so ascertained (b).]

7. **Payment into Court must be upon the footing of an equity alleged by the plaintiff.** — The plaintiff cannot ask for payment of money into Court upon the footing of an equity not alleged by him in his pleadings, but only stated by the

[(d) *Hampden v. Wallis*, 27 Ch. D. 251.]

(e) *Dubless v. Flint*, 4 M. & Cr. 502; *M'Hardy v. Hitchcock*, 11 Beav. 73; *Bank of Turkey v. Ottoman Company*, 2 L. R. Eq. 366.

(f) *Hagell v. Currie*, 2 L. R. Ch. App. 452, *per* L. J. Cairns.

[(a) See *Freeman v. Cox*, 8 Ch. D. 148; but see *Nesbitt v. Baldwin*, 7 L. R. Ir. 134.]

[(b) *London Syndicate v. Lord*, 8 Ch. D. 84.]



answer [or statement of defence.] Thus, where the plaintiff filed a bill claiming one-fifth of the residuary estate of a testator and asking relief as in the case of an open account, and the defendant by his answer stated a deed amounting to a settlement of account under which he admitted a sum to be due from him, it was held that the plaintiff could not without amending his bill obtain payment into Court of the sum so admitted to be due (c).

8. **Not necessary that fund should be actually in defendant's hands.**—It is not necessary that the defendant should acknowledge the fund to be in his hands at the time of the answer; for if he admit that he once actually received it, and state that he afterwards applied it in a way not authorised by the trust, the Court will fasten upon the receipt, and not allow him to discharge himself by pleading a breach of duty; as, if a trustee admit that he once had a fund in his hands, but that he afterwards allowed it to be received by a co-trustee who misapplied it (d), or that he afterwards sold it out and did not re-invest it (e), or paid it away improperly (f), or lent it on personal (g) or other security (h) not within the terms of the trust. And no attention will be paid to the objection that the suit is for the very purpose of securing the fund, and therefore that the money ought not to be ordered into Court until decree (i).

[\*980] \* 9. **Payments not mentioned in answer may be verified by affidavit.**—But if an executor (and the rule must apply equally to a trustee) admits in his answer [or statement of defence] that he has received a specific sum, but adds that he has made payments, the amount whereof he

(c) *Proudfoot v. Hume*, 4 Beav. 476.

(d) *Ingle v. Partridge*, 32 Beav. 661; *Symonds v. Jenkins*, 34 L. T. N. S. 277; 24 W. R. 512.

(e) *Wiglesworth v. Wiglesworth*, 16 Beav. 272; *Phillipo v. Munnings*, 2 M. & Cr. 309; and see *Meyer v. Montriou*, 4 Beav. 346; *Futter v. Jackson*, 6 Beav. 424.

(f) See *Scott v. Becher*, 4 Price,

350; *Meyer v. Montriou*, 4 Beav. 343; *Nokes v. Seppings*, 2 Ph. 19.

(g) *Vigrass v. Binfield*, 3 Mad. 62; *Collis v. Collis*, 2 Sim. 365; *Roy v. Gibbon*, 4 Hare, 65.

(h) *Wyatt v. Sharratt*, 3 Beav. 498; *Costeker v. Horrox*, 3 Y. & C. 530; *Hinde v. Blake*, 4 Beav. 597; *Bourne v. Mole*, 8 Beav. 177.

(i) See *Rothwell v. Rothwell*, 2 S. & S. 217; *Wyatt v. Sharratt*, 3 Beav. 498; *Collis v. Collis*, 2 Sim. 365.

does not specify, in respect of the testator's estate, the Court will allow him to verify by affidavit the amount of the payments properly made, and will order him to pay in the actual balance (a).

10. **Payment of money into Court not ordered on a mere admission of circumstances showing a liability.** — Payment of money into Court is, in general, confined to the cases of a defendant's admission of actual possession of the fund, or of a receipt not followed by any subsequent legal discharge, and is not ordered upon a mere admission of facts from which a liability may be inferred (b). Thus, if a defendant admit that he has had a fund in his hands from a certain time, and it clearly appears that he is liable and will be decreed at the hearing to pay interest; yet the Court will not order him to pay interest on motion (c), unless he also admit that he has actually made interest, which amounts to a receipt (d).

11. The case of *Rothwell v. Rothwell* (e) is no exception to this rule, for there the defendant had covenanted with the trustees of his marriage settlement to pay 850*l.* within twelve months from the marriage; and the covenant not having been performed, the children filed a bill against the covenantor and the trustees to have the money raised; and the defendant admitting "that the 850*l.* had not been got in, but that *it was still in his hands*," the Court ordered the payment into Court, not on the admission of the debt, but "that *it was still in his hands*."

12. **Special case of a trustee who is a debtor to his trust estate.** — However, in some cases the Court orders payment into Court upon motion of what is apparently a mere debt; as, where an executor or trustee admits himself to owe a debt to the estate he represents, for here the person to pay and the person to receive being the same, the Court assumes that what ought to have been done has been done, and orders

(a) *Anon.* 4 Sim, 359; and see *Proudfoot v. Hume*, 4 Beav. 476; *Roy v. Gibbon*, 4 Hare, 65.

(b) See *Richardson v. Bank of England*, 4 M. & Cr. 174; *Peacham v. Daw*, 6 Mad. 98.

(c) *Wood v. Downes*, 1 V. & B. 50.

(d) *Freeman v. Fairlie*, 3 Mer. 43; see *Wood v. Downes*, 1 V. & B. 50.

(e) 2 S. & S. 217; see *Richardson v. Bank of England*, 4 M. & Cr. 174.

the payment, not as of a debt by a debtor, but as of monies realised in the hands of the executor or trustee (*f*). Thus, where A., B. and C. were appointed *executors* of a will, of whom A. and C. alone proved, and A. and B. were appointed *trustees*, and a bill was filed by A. for the [\*981] administration \* of the trusts of the will, and B. by his answer admitted that he and his partner G. B. were indebted to the testatrix at the time of her decease, and that part of the assets had been lent to the partnership by C., and that the sum of 1137*l.* 7*s.* 10½*d.* was due from the partnership to the estate on the balance of accounts, and that the debt owing from the partnership, and the monies received from C. the executor, had been treated as part of the assets, and applied partly in payment of testatrix's debts, and as to the residue upon the trusts of the will, the Court held, notwithstanding B.'s disclaimer of having acted, that he must be deemed to have acted as executor and trustee, and as such to have received the monies in question, and ordered him to pay the balance into Court (*a*).

13. **Where trustees mean to apply the fund.**—Trustees will not be ordered to pay into Court where they have a discretionary power over the fund, and it appears that they are intending *bonâ fide* to exercise it; for this would only lead to expense by occasioning the necessity of another application to have the fund paid out again (*b*).

14. **Whether the order is matter of course.**—Lord Langdale once said, that according to the old practice it was mere matter of course to order trust funds into Court, but that the question now was whether there existed any sufficient ground for the order, such as danger of the fund, &c. (*c*). V. C. Stuart subsequently declared his adherence to the old practice (*d*); [but in a recent case V. C. Hall was of opinion that the rule was not absolute, but a reasonable ground for the payment must be made out (*e*).]

(*f*) *Richardson v. Bank of England*, 4 M. & Cr. 174, *per* Lord Cottenham.

(*a*) *White v. Barton*, 18 Beav. 192.

(*b*) *Talbot v. Marshfield*, 2 Dr. & Sm. 285.

(*c*) *Ross v. Ross*, 12 Beav. 89.

(*d*) *Robertson v. Scott*, 14 L. T. N. S. 187.

[(*e*) *Re Braithwaite*, 21 Ch. D. 121.]

15. **Payment into Court at the hearing.** — The Court will occasionally make an order for payment into Court at the hearing of the cause, "*ex debito justitiæ*," though it might have hesitated to do so upon an interlocutory application by motion; as, where a plaintiff having only a remote contingent interest in a fund claims at the hearing to have the fund brought into Court (*f*). And an order for payment into Court will be made at the hearing, if proper, without any notice of motion for that purpose (*g*).

16. **Time allowed for payment into Court.** — The time to be given for payment of money into Court will depend on the circumstances of the case. If it be money in the defendant's hands, it will be ordered in forthwith, and an immediate transfer may be directed of stock standing in the defendant's \*name. Where the defendant had improp- [\*982] erly lent a sum on personal security, but no insolvency was suggested nor any danger as to the money, the Court ordered it to be paid in, on or before, the first day of the following term (*a*). In another case, where the defendant had lent 820*l.* upon a mortgage not authorised by the trust, the Court allowed six weeks, with liberty to apply for further time if the circumstances should then warrant the indulgence (*b*).

17. **Distringas.** — Where a [notice in lieu of] *distringas* or injunction has been previously obtained against the transfer of the stock, the Court orders the transfer into Court to be made, "notwithstanding the notice or injunction."

#### SECTION IV.

##### OF RECEIVERSHIP.<sup>1</sup>

1. **Receiver will be appointed at the instance of all the cestuis que trust.** — As the *cestuis que trust* or parties beneficially

(*f*) *Governesses Institution v. Rusbridger*, 18 Beav. 467.

(*a*) *Vigrass v. Binfield*, 3 Mad. 62; and see *Hinde v. Blake*, 4 Beav. 597;

(*g*) *Isaacs v. Weatherstone*, 10 Hare, App. xxx.

*Roy v. Gibbon*, 4 Hare, 65.

(*b*) *Wyatt v. Sharratt*, 3 Beav. 498; *Score v. Ford*, 7 Beav. 333.

<sup>1</sup> A receiver will be appointed, pending proceedings for the removal of a trustee; *Jones v. Dougherty*, 10 Ga. 273; *Calhoun v. King*, 5 Ala. 523. There

interested in an estate are in equity the owners of it, should they concur in an application for a receiver and the trustee consents, the Court will at any time make the order (*c*). But the usual recognisances will not be dispensed with (*d*).

2. **Also where trustee is guilty of misconduct, or is insolvent, bankrupt, &c.** — And as each *cestui que trust* is entitled to have the fund properly protected, a receiver will be granted at his instance if it can be shown that the trustee has been guilty of misconduct, waste, or improper disposition of the trust estate (*e*), or that he has an undue leaning or bias towards one of two conflicting parties (*f*), or that the fund is in danger from his being in insolvent circumstances (*g*), or being a bankrupt (*h*), or that one trustee has misconducted himself, the other consenting to the order (*i*), or that [\*983] he is \*incapacitated from acting (*a*), or that the executor is a person of bad character, drunken habits, and great poverty (*b*). [And a receiver will be appointed against an executor in a creditors' action, if there is any danger of his paying any creditor in full, and the application

(*c*) *Brodie v. Barry*, 3 Mer. 696; *Beaumont v. Beaumont*, cited Ib. 696; see *Browell v. Reed*, 1 Hare, 435.

(*d*) *Manners v. Furze*, 11 Beav. 30; *Tylee v. Tylee*, 17 Beav. 583.

(*e*) *Anon.* 12 Ves. 5 *per* Sir W. Grant; and see *Middleton v. Dodswell*, 13 Ves. 266; *Howard v. Papera*, 1 Mad. 142; *Richards v. Perkins*, 3 Y. & C. 299; *Evans v. Coventry*, 5 De G. M. & G. 911.

(*f*) *Earl Talbot v. Scott*, 4 K. & J. 139.

(*g*) *Scott v. Becher*, 4 Price, 346;

*Mansfield v. Shaw*, 3 Mad. 100; and see *Anon.* 12 Ves. 4; *Middleton v. Dodswell*, 13 Ves. 266; *Havers v. Havers*, Barn. 23.

(*h*) *Gladdon v. Stoneman*, 1 Mad. 143, note; *Langley v. Hawk*, 5 Mad. 46; [*Re Hopkins*, 19 Ch. D. 61.]

(*i*) *Middleton v. Dodswell*, 13 Ves. 266.

(*a*) *Bainbrigge v. Blair*, 3 Beav. 421.

(*b*) *Everett v. Prythergch*, 12 Sim. 367, 368.

must be good cause shown before a receiver will be appointed, but if the trust property is in danger, there will be no hesitation about it; *Ogden v. Kip*, 6 Johns. Ch. 160; *Poythress v. Poythress*, 16 Ga. 406. A receiver will ordinarily pay claims without preference; yet there may be some legal preferences; *M'Dermutt v. Strong*, 4 Johns. Ch. 687; *Austin v. Bell*, 20 Johns. 442; *Le Prince v. Guillemot*, 1 Rich. Eq. 220; *Gracey v. Davis*, 3 Strob. Eq. 58. When necessary an heir will be regarded as a trustee, and rents and profits may accumulate in his hands, for the benefit of an executory devisee, until the vesting of the estate, but the court may in its discretion appoint a receiver of them for that purpose; *Rogers v. Ross*, 4 Johns. Ch. 388; 8 Am. Dec. 575.

for a receiver in such a case may be made *ex parte* immediately upon the issuing of the writ (c).]

3. **Where executrix a feme covert, and husband abroad.**—

And a receiver was appointed [in a case under the old law] where the executrix was a *feme covert*, and the husband, besides being in indifferent circumstances, was out of the jurisdiction, for in such a case, said the Court, if the executrix waste the assets or refuse payment, the party aggrieved has no remedy, as the husband must be joined in the action (d). [But now that the husband is not a necessary party to an action against the executors, and is not subject to liabilities by reason of any devastavit committed by his wife unless he has acted or intermeddled in the administration, it is conceived that his poverty or absence would be no ground for the appointment of a receiver (e).]

4. **Receiver where trust estate unprotected.**— And a receiver has been ordered where four trustees had been named in a will and one died, and another was abroad, and the third had scarcely interfered in the trust, and, the fourth submitted to a receiver by his answer (f). In another case three trustees had *disagreed*, and a receiver was appointed (g): the order was taken by arrangement between the parties, but the Court had previously expressed its opinion that, unless the trustees could agree, a receiver *must* be appointed (h). Where two out of three trustees chose to act separately, and took securities in their own names omitting that of the dissentient trustee, a *cestui que trust* was held entitled to a receiver (i). And the Court will grant a receiver at the instance of the *cestui que trust*, when the single trustee is, or all the trustees are out of the jurisdiction (j).

5. **Receiver not granted on slight grounds.**— But the Court is not in the habit of granting a receiver, and so taking the administration out of the hands of the trustees, the natural

[(c) *Re Radcliffe deceased*, 7 Ch. D. 733.]

(d) *Taylor v. Allen*, 2 Atk. 213.

[(e) 45 & 46 Vict. 75, ss. 18, 24.]

(f) *Tidd v. Lister*, 5 Mad. 429.

(g) *Day v. Croft*, May 2, 1839,

M. R.

(h) See now *Hart v. Denham*, W. N. 1871, p. 2.

(i) *Swale v. Swale*, 22 Beav. 584.

(j) *Noad v. Backhouse*, 2 Y. & C.

C. C. 529; *Smith v. Smith*, 10 Hare,

App. lxxi.

curators of the estate, upon very slight grounds (*k*). Thus it is no sufficient cause for a receiver that one of several trustees \* has *disclaimed* (*a*), or is *inactive*, or *gone abroad* (*b*). Nor is it a sufficient cause that trustees are in *mean* (not insolvent) circumstances (*c*), or being trustees for sale have let the purchaser into possession before they received the purchase money, for the Court will not *necessarily* infer this to be misconduct (*d*).

6. **Receiver not discharged at the mere instance of the party procuring his appointment.**—When a receiver is appointed under the authority of the Court, he is appointed for the benefit of all parties interested, and therefore will not be discharged merely on the application of the party at whose instance the order was made (*e*).

7. **An exception under special circumstances.**—However, when a receiver had been appointed on the application of the plaintiff the tenant for life, on the ground of the misconduct of one of the trustees, and the incapacity of the other, and afterwards three new trustees were appointed by the Court, who, on a motion by the plaintiff to discharge the receiver, undertook to receive the rents and pass their accounts half-yearly before the Master in the same way as a receiver, the Court said it was not proposed to deprive any party of the protection of a receiver, but merely to substitute the trustees in his place; that the tenant for life ought not unnecessarily to be charged with the costs of a receiver; that it was not intended to put the tenant for life in possession; that if any objections were shown to the trustees the application would be refused, but in the absence of such objections it was a reasonable request: and the order for discharging the receiver was made (*f*).

(*k*) See *Middleton v. Dodswell*, 13 Ves. 268; *Barkley v. Lord Reay*, 2 Hare, 306.

(*a*) *Browell v. Reed*, 1 Hare, 434; but see *Tait v. Jenkins*, 1 Y. & C. C. 492.

(*b*) *Browell v. Reed*, 1 Hare, 434, *per* Sir J. Wigram.

(*c*) *Anon. case*, 12 Ves. 4; *Howard v. Papera*, 1 Mad. 142; and see *Ha-*

*thornthwaite v. Russel*, 2 Atk. 126. In *Havers v. Havers*, Barn. 23, the Court considered misapplication probable.

(*d*) *Browell v. Reed*, 1 Hare, 434.

(*e*) *Bainbrigge v. Blair*, 3 Beav. 423, *per* Lord Langdale.

(*f*) *Bainbrigge v. Blair*, 3 Beav. 421, 423, 424; and see *Poole v. Franks*, 1 Moll. 80.

8. **Expense of receiver falls on life estate.** — Where the Court appoints a receiver, the poundage and the expenses of passing his accounts fall upon the income of the tenant for life (*g*).

[9. **Receiver's priority for his costs and his remuneration.** — Where property was realised in an action by debenture-holders against their trustees to execute the trusts of the deed for securing the debentures, and a receiver and manager had also been appointed in the action, the receiver and manager was allowed the balance due to him, including his remuneration and his costs of the action, in priority to the costs, charges, and expenses of the trustees, and the costs of the plaintiffs other than the plaintiffs' costs of the realisation of the property (*h*).]

## \* SECTION V.

[\*985]

OF COSTS OF SUIT.<sup>1</sup>

I. **Cost as between trustees and strangers.** — *As between strangers on the one hand, and trustees and cestuis que trust on the other.*

1. In these cases, the trustee is on no better footing than any ordinary plaintiff or defendant, for the circumstances of the trust cannot be allowed to affect the interest of a third

(*g*) *Shore v. Shore*, 4 Drew. 510.

[(*h*) *Batten v. Wedgwood Coal and Iron Company*, 28 Ch. D. 317.]

<sup>1</sup> *Costs.* — Generally as between the trustee and *cestui que trust*, the costs will be paid from the trust fund, or by the *cestui que trust*; *Bliss v. American Bible Society*, 2 Allen, 334; *Bendall v. Bendall*, 24 Ala. 295; *Morton v. Barrett*, 22 Me. 257; *Hosack v. Rogers*, 9 Paige, 463; *Graver's App.* 50 Pa. St. 189; *Minuse v. Cox*, 5 Johns. Ch. 451. If the *cestui que trust* brings any proceeding against the trustee, without due cause, he must pay the costs; *Downing v. Marshall*, 37 N. Y. 380; a trustee can make no additional charge for his own services as attorney in such cases; *Mayer v. Galluchat*, 6 Rich. 1. Trustees generally receive costs whether they are plaintiffs or defendants; *Towle v. Swasey*, 106 Mass. 108; *Sargent v. Sargent*, 103 Mass. 297; *Bowditch v. Soltik*, 99 Mass. 136; *Hepburn's App.* 65 Pa. St. 472.

If a trustee fails to account, the costs will come upon him; *Burnham v. Dalling*, 1 Green (N. J.) 310; so if he mixes trust funds with his own; *Bogle v. Bogle*, 3 Allen, 158; or follows out a capricious notion; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Brinton's Est.* 10 Barr, 408; or does not do his duty; *Ibid*; *Kent v. Hutchins*, 50 N. H. 92; *Lathrop v. Smalley*, 23 N. J. Eq. 192. If a



person (a). Thus, if a trustee fail in his application to the Court, he must pay the costs of it (b).

(a) *Burgess v. Wheate*, 1 Eden, 251, *per* Lord Northington.

(b) *Ex parte Angerstein*, 9 L. R. Ch. App. 479; [*Pitts v. La Fontaine*, 6 App. Cas. 482.]

trustee seeks to collect an unjust bill from the *cestui que trust*, the former pays the costs; *Waterman v. Cochran*, 12 Vt. 699; or refuses to let the *cestui que trust* use his name in a proceeding beneficial to the trust estate; *Guyton v. Shane*, 7 Dana, 498; or institutes proceedings for his own benefit; *Ingram v. Kirkpatrick*, 8 Ired. Eq. 62; *Manning v. Manning*, 1 Johns. Ch. 535; but see *Atcheson v. Robertson*, 4 Rich. Eq. 44. For any charge against the trustee, the costs are upon him; *Bickham v. Smith*, 55 Pa. St. 335; likewise if he make an ungrounded defence; *Burnham v. Dalling*, 1 Green, Ch. 310; *Duncomb v. Dunscomb*, 1 Johns. Ch. 508. If a trustee is guilty of any breach, he will receive no costs; *Spencer v. Spencer*, 11 Paige, 159; or has made a mistake; *Robertson v. Wendell*, 6 Paige, 322. If a trustee makes it necessary to audit his accounts, he can receive no costs, though he pays none; *Norris's App.* 71 Pa. St. 115. If a trustee is in doubt as to the course he should pursue, he may ask the court for instructions, and receive his costs in connection therewith; *Armstrong v. Zane*, 12 Ohio, 287; *Dustan v. Dustan*, 1 Paige, 509.

If it is necessary to obtain from the courts an interpretation of a declaration of trust, the costs come out of the trust estate, and as it is the fault of the settlor, it is proper that they should; *Sawyer v. Baldwin*, 20 Pick. 378; *Bowditch v. Soltyk*, 99 Mass. 136; *Bigelow v. Morong*, 103 Mass. 287; *Monks v. Monks*, 7 Allen, 401; *King v. Strong*, 9 Paige, 94. In case of particular legacies where the decision will neither aid nor hinder the trust estate, the costs may come from that particular legacy; *Birdsall v. Hewlett*, 1 Paige, 32.

If the trustees are either plaintiffs or defendants in suits with strangers, the party succeeding will receive costs from the other; *Knowles v. Knowles*, 86 Ill. 1; *Hanson v. Jacks*, 22 Ala. 549; *Knox v. Bigelow*, 15 Wis. 415; *Rose v. Rose*, 28 N. Y. 184; *Buckels v. Carter*, 6 Rich. 106. If trustees bring unjustifiable suits, they must pay the costs; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Savage v. Dickson*, 16 Ala. 260. If trustees are entitled to costs, they are allowed them in their accounts; *Cassey's Est.* 47 Pa. St. 424; *Knox v. Pickett*, 4 Des. 92; *Graver's App.* 50 Pa. St. 189; *Long v. Israel*, 9 Leigh, 556; *Hardy v. Call*, 16 Mass. 530; *Miles v. Bacon*, 4 J. J. Marsh. 457; *Abbott v. Bradstreet*, 3 Allen, 587; *Collins v. Townley*, 21 N. J. Eq. 353; *Drew v. Wakefield*, 54 Me. 291. Parties disputing a will may be held for costs; *Perrine v. Applegate*, 1 McCarter, 531; *Nickerson v. Buck*, 12 Cush. 343; *Collins v. Townley*, 21 N. J. Eq. 353; *Woodbury v. Obear*, 7 Gray, 472. A *cestui que trust* incurring costs at law against his trustee in defending a legal title, instead of coming at once into equity, cannot recover costs, but is entitled to be reimbursed for any costs paid the trustee; *Keaton v. Cobb*, 1 Dev. Eq. 439; 18 Am. Dec. 595; *Allen v. Gilreath*, 6 Ired. Eq. 252; *Murphy v. Grice*, 2 Dev. & B. Eq. 199. If strangers force trustees into court, the latter may have their costs; *Ibid*; *Wood v. Vandeburgh*, 6 Paige, 278. Yet if the stranger is defeated, the courts may throw the costs upon the trustee, the amount to come from the trust estate; *Kreitz v. Frost*, 55 Barb. 474; *State v. Tolan*, 33 N. J. L. 195; there must be a special order, to give either party costs; *Ibid*.

2. **Costs where trustees cannot make a title.** — So, in a suit by a stranger for specific performance of a contract, the vendor trustee for sale must, if he cannot make a title, pay the costs of the suit agreeably to the general rule (*c*).

3. **Trustee made a defendant as a necessary party.** — So, where trustees or executors are brought before the Court as necessary parties by a stranger, if the trustees or executors contest the claims of the plaintiff, and the plaintiff recover in the suit, they are not entitled to the costs (*d*).

4. **Plaintiff failing in his suit not necessarily bound to pay costs of a trustee.** — If a plaintiff *fail* in his suit, but stands in so hard a case that he ought not to *pay* any costs, the Court will not oblige him to pay the costs of a defendant because the latter happens to sustain the character of a trustee (*e*).

5. **Trustee to bar dower.** — In a foreclosure action against the mortgagor and his trustee to bar dower, the trustee is not entitled to his costs as against the mortgagee (*f*).

6. **Trustee has costs as between party and party only.** — Where an action by a stranger is dismissed with costs, a trustee, who is a defendant, will not, as is usual between trustee and *cestui que trust*, be ordered his costs as between solicitor and client, but only as between party and party (*g*).

(*c*) *Edwards v. Harvey*, G. Coop. 40; and see *Hill v. Magan*, 2 Moll. 460; *Elsay v. Lutyens*, 8 Hare, 164.

(*d*) *Rashley v. Masters*, 1 Ves. jun. 201, see 205.

(*e*) *Brodie v. St. Paul*, 1 Ves. jun. 326, see 334.

(*f*) *Horrocks v. Ledsam*, 2 Coll. 208.

(*g*) *Mohun v. Mohun*, 1 Sw. 201; *Saunders v. Saunders*, 3 Jur. N. S. 727.

The party winning may be ordered to pay the costs; *Gray v. Dougherty*, 25 Cal. 266; *Coleman v. Ross*, 46 Pa. St. 180. Courts have a large discretion in the matter of costs; *Taylor v. Root*, 48 N. Y. 687. Where a trustee set up an improper claim to property, and a bill was filed to compel him to give it up, the court charged him with costs; *Fisher v. Wilson*, 2 Chy. 200. A trustee refusing to allow his name to be used in a defence, cannot have costs; *Ellis v. Ellis*, 7 Chy. 102; also one making a separate, instead of a joint defence; *Gibson v. Annis*, 11 Chy. 481; *Lavin v. O'Neill*, 13 Chy. 179; costs in ejectment are allowed; *Edinburgh Life Assur. Co.* 23 Chy. 230; are not allowed in some suits to establish a trust; *English v. English*, 15 Chy. 330. Surviving trustee and representatives may get individual costs; *Reid v. Stephens*, 3 Chy. Chamb. 372; for other cases, see *Wiard v. Gable*, 8 Chy. 458; *Hope v. Beard*, 11 Chy. 212; *Meighen v. Buell*, 25 Chy. 604; *Morgan v. Holland*, 7 P. R. 74.

7. **Trustee respondent to petition of cestui que trust.** — Where money has been paid into Court by a Railway Company, and the *cestui que trust* are petitioners and the trustee a respondent, the company must pay the costs of both, as the [\*986] trustee \* is justified in appearing separately to inform the Court that the order is right (*a*).

8. **Costs in creditor's suit.** — If a creditor filed a bill against an executor for payment of a debt, the rule which [until the recent alteration in the practice of the Court] prevailed at law was not also the rule of *equity*, viz., that if the creditor recovered he should be entitled to his costs, *de bonis testatoris*, and if there were none, then *de bonis propriis* of the executor; for the consideration of costs in *equity* rested entirely in the discretion of the Court (*b*).

**Executor (though not so formerly) now held entitled to his costs in preference to the plaintiff.** — As the law formerly stood, if the assets were not sufficient to cover both the plaintiff's debt and costs, the executor was not decreed in equity to pay costs personally (*c*), unless he had misconducted himself, as by having satisfied simple contract debts in preference to debts upon specialty (*d*); but he was not entitled to retain his own costs out of the assets in preference to the claims of the plaintiff (*e*). And if a bill had been filed by a specialty creditor, and the specialty debt had exhausted the personal assets, the executor could not have claimed to be reimbursed out of the real estate to the prejudice of testator's heir (*f*): for the executor, it was said, should have considered the risk before he applied for the probate (*g*). But now the practice is that the executor shall have his own costs in the first place,

(*a*) *Ex parte* Metropolitan Railway Company, 16 W. R. 996.

(*b*) *Twisleton v. Thelwel*, Hard. 165; *Uvedale v. Uvedale*, 3 Atk. 119; but see *Davy v. Seys*, Mos. 204. [Now by Rules of the Supreme Court, 1883, Order 65, R. 1, the costs of and incident to all proceedings in the Supreme Court are in the discretion of the Court.]

(*c*) *Twisleton v. Thelwel*, Hard. 165; *Morony v. Vincent*, 2 Moll. 461.

(*d*) *Jeffries v. Harrison*, 1 Atk.

468; and see *Bennett v. Atkins*, 1 Y. & C. 247; *Wilkins v. Hunt*, 2 Atk. 151.

(*e*) *Humphrey v. Morse*, 2 Atk. 408; *Sandys v. Watson*, 2 Atk. 80; and see *Adair v. Shaw*, 1 Sch. & Lef. 280.

(*f*) *Uvedale v. Uvedale*, 3 Atk. 119; and see *Nash v. Dillon*, 1 Moll. 237.

(*g*) See *Uvedale v. Uvedale*, 3 Atk. 119; *Humphrey v. Morse*, 2 Atk. 408.

even as against the plaintiff, for the Court will not take the fund out of his hands until his costs are paid (*h*).

## II. *Of costs as between trustees and cestuis que trust, inter se.*

1. **Trustee entitled to costs as a general rule.**—The general rule is that a trustee shall have his costs of suit awarded to him at the hearing either out of the trust estate, or to be paid by his *cestui que trust* (*i*). And if there be a fund under \* the control of the Court he will have his costs [\*987] as between solicitor and client (*a*). And if there be no fund, still if the *cestuis que trust* chose to bring the trustees before the Court for obtaining its directions as to the rights of the parties or the mode of administration, and the trustees are free from blame, the trustees are entitled to their costs as between solicitor and client as against the *cestuis que trust personally* (*b*). But if plaintiffs take proceedings for the purpose of creating a fund, of which the defendants would be trustees for plaintiffs, if plaintiffs succeeded, but the plaintiffs fail, the defendants are entitled as against the plaintiffs to costs only as between party and party (*c*).

(*h*) *Bennet v. Going*, 1 Moll. 529; *Tipping v. Power*, 1 Hare, 405; *Ottley v. Gilby*, 8 Beav. 603; *Tanner v. Dancey*, 9 Beav. 339.

(*i*) 1 Eq. Ca. Ab. 125, note (*a*); *Hall v. Hallet*, 1 Cox, 141, *per* Lord Thurlow; *Attorney-General v. City of London*, 3 B. C. C. 171; *Norris v. Norris*, 1 Cox, 183; *Sanmes v. Rickman*, 2 Ves. jun. 38, *per* Lord Chief Baron Eyre; *Rashley v. Masters*, 1 Ves. jun. 201; *Rock v. Hart*, 11 Ves. 58; *Maplett v. Pocock*, Rep. t. Finch, 136; *Landen v. Green*, Barn. 389; *Taylor v. Glanville*, 3 Mad. 176, etc.; [*Re Love*, 29 Ch. D. 348. By Order 65, R. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings, including the administration of estates and trusts, are in the discretion of the Court, but this is not to deprive an executor, administrator,

trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules previously acted upon in the Chancery Division; see *Re Hodgson*, W. N. 1884, p. 117, where the action had been instituted before the order came into operation. *Re McClellan*, 29 Ch. D. 495.]

(*a*) *Mohun v. Mohun*, 1 Sw. 201, *per* Sir T. Plumer; *Moore v. Frowd*, 3 M. & Cr. 49, *per* Lord Cottenham.

(*b*) *Attorney-General v. Cuming*, 2 Y. & C. C. C. 155; but see *Edenborough v. Archbishop of Canterbury*, 2 Russ. 112.

(*c*) *Saunders v. Saunders*, 3 Jur. N. S. 727; *Mohun v. Mohun*, 1 Sw. 201.

2. **Charges and expenses.** — If it appear upon the pleadings, or the Court be otherwise satisfied, that the trustee has sustained charges and expenses beyond the costs of suit, the Court will order him his *costs, charges and expenses, properly incurred*. But an order made in a suit in this form will not comprise costs, charges and expenses, incurred in defending *other* suits, unless they be specially mentioned (*d*).

[3. **Priority.** — If the trust estate be insufficient for the payment of all the costs of the action, the trustee is entitled to have his costs, charges and expenses, paid in priority to the costs of the *cestuis que trust* (*e*). But the costs of realising the trust estate will have priority over the trustees' costs, charges and expenses, as will also the costs and remuneration of a receiver appointed in the suit (*f*).]

4. **Professional charges.** — If the trustee be a *solicitor*, he cannot make the usual professional charges, but the Court will not *declare* that the trustee shall have his *costs out of pocket* only, but will give him his costs as between solicitor and client in the usual way, and leave it to the taxing officer to deal with the effect of the order (*g*).

5. **Practice in creditors' and legatees' suits where fund is deficient.** — A singular application of the rules respecting costs as between trustees and third persons, and as between trustees

and their *cestuis que trust inter se*, arises in the [\*988] case of a deficient fund. If a *creditor* \* bring an action

for administration and there is a surplus, he can only have costs as between party and party, for that is all that he is entitled to as against the residuary legatees with whom he has no privity; but if the estate be deficient, and is devisable amongst the creditors *pro ratâ*, the creditor is regarded in the light of a trustee for himself and the other creditors, and then as between him and his co-creditors he is allowed his costs as between solicitor and client. Thus the less the estate the larger the plaintiff's costs. The same principle applies, *mutatis mutandis*, to a suit by a *legatee* where the fund, *after payment of debts*, is sufficient for discharge of the *legacies* in

(*d*) *Payne v. Little*, 27 Beav. 83.

[(*f*) *Batten v. Wedgwood Coal*

[(*e*) *Dodds v. Tuke*, 25 Ch. D. 617.] and *Iron Company*, 28 Ch. D. 317.]

(*g*) *York v. Brown*, 1 Coll. 260.

full (a); but otherwise if the fund be insufficient for payment of *debts* (b). Where the personalty had been exhausted, and a creditors' suit was instituted against the devisees of the *real* estate, which was also likely to prove deficient, the order was that the proceeds should be applied first in payment of the costs of plaintiffs and defendants as between party and party *pari passu*, and then in discharge of the debts, and if the fund were insufficient for the latter purpose, then as between the plaintiffs and the other creditors the plaintiffs should be paid their extra costs as between solicitor and client (c).

6. **Trustee not appearing.**—Where the trustee did not appear at the hearing, and a decree *nisi* was made against him, and the trustee set down the cause again, and prayed to have his costs of the suit upon his paying the costs of the day, Lord Kenyon said, "The payment of the costs of the day makes the trustee *rectum in curia*; and as he would most unquestionably have been entitled to his costs if he had appeared at the original hearing, so he now stands in the same situation, and is therefore entitled to his costs" (d).

7. **Decree passed.**—But if the decree has been *passed*, a trustee who has omitted to ask for his costs at the hearing cannot have the cause re-heard upon the subject of costs only, and cannot obtain an order for payment of his costs upon presenting a petition (e).

8. **Disclaimer.**—If a person named as trustee be made defendant to a suit, and by his defence disclaim the trust, the suit will be dismissed as against him with *costs* (f); but not with *costs as between solicitor and client*, for, having refused to accept the office, he stands in the \* position [\*989] of an ordinary defendant (a); and if his defence be

(a) *Thomas v. Jones*, 1 Dr. & Sm. 134, and cases there cited; and see *Tardrew v. Howell*, 2 Giff. 530.

(b) *Weston v. Clowes*, 15 Sim. 610; *Newman v. Hatch*, Set. on Dec. p. 875, 4th ed.; *Wettenhall v. Davis*, 9 Jur. N. S. 1216; S. C. *nom. Wettenhall v. Dennis*, 33 Beav. 285.

(c) *Henderson v. Dodds*, 2 L. R. Eq. 532.

(d) *Norris v. Norris*, 1 Cox, 183.

(e) *Colman v. Sarell*, 2 Cox, 206.

(f) *Hickson v. Fitzgerald*, 1 Moll.

14.

(a) *Norway v. Norway*, 2 M. & K. 278, overruling *Sherratt v. Bentley*, 1 R. & M. 655.

unnecessarily long, he will only be allowed the reasonable costs of a disclaimer (*b*).

9. **Costs of trustee of a void deed.** — If a person be a trustee of a deed void as against creditors, or on other grounds, the plaintiff by praying a *conveyance* by the trustee may elect to treat him in that character, so as to give him a claim to costs (*c*). Otherwise the *so-called* trustee is a trustee of a nullity, and he and his *cestui que trust* cannot have costs as against the true owner (*d*); more particularly if the deed to which the trustee is a party contain a false recital for the purpose only of misleading (*e*); and if the trustee's claim to the expenses of the *so-called* trust be the occasion of the suit, he will be ordered to pay costs (*f*). [So, where the trustee had prepared the settlement and had persuaded the settlor to execute it, he was ordered to pay the costs of the action to set it aside (*g*).] If a suit be instituted against trustees of an instrument, which is a nullity, for enforcing the void trusts, and the suit is dismissed, the *quasi* trustees will have their costs, but only as between party and party (*h*).

10. **Suit originated by the trustee's misconduct.** — If any particular instance of misconduct, or a general dereliction of duty in the trustee (*i*), or even his mere caprice and obsti-

(*b*) *Martin v. Persse*, 1 Moll. 146.

(*c*) *Snow v. Hole*, V. C. of England, March 8, 1845; and see *Goldsmith v. Russell*, 5 De G. M. & G. 547, 556; *Daking v. Whimper*, 26 Beav. 571; *Ponsford v. Widnell*, W. N. 1869, p. 81; *Travis v. Illingworth*, W. N. 1868, p. 206; *Ex parte Tomlinson*, 3 De G. F. & J. 745; and see *ante*, p. 640.

(*d*) *Elsey v. Cox*, 26 Beav. 95; *Crossley v. Elworthy*, 12 L. R. Eq. 158.

(*e*) *Turquand v. Knight*, 14 Sim. 643.

(*f*) *Smith v. Dresser*, 1 L. R. Eq. 651; S. C. 35 Beav. 378.

(*g*) *Dutton v. Thompson*, 23 Ch. D. 278.]

(*h*) *Mohun v. Mohun*, 1 Sw. 201.

(*i*) *Springett v. Dashwood*, 2 Giff. 521; *Byrne v. Norcott*, 13 Beav. 346; *Attorney-General v. Hobert*, Rep. t.

*Finch*, 259; *Earl Powlet v. Herbert*, 1 Ves. jun. 297; *Caffrey v. Darby*, 6 Ves. 488; *Littlehales v. Gascoyne*, 3 B. C. C. 73; *Ashburnham v. Thompson*, 13 Ves. 402; *Hide v. Haywood*, 2 Atk. 126; *Adams v. Clifton*, 1 Russ. 297; *Mosley v. Ward*, 11 Ves. 581; *Piety v. Stace*, 4 Ves. 620; *Seers v. Hind*, 1 Ves. jun. 294; *Fell v. Lutwidge*, Barn. 319, see 322; *Brown v. How*, Barn. 354, see 358; *Sheppard v. Smith*, 2 B. P. C. 372; *Haberdashers' Company v. Attorney-General*, 2 B. P. C. 370; *Franklin v. Frith*, 3 B. C. C. 433; *Whistler v. Newman*, 4 Ves. 129; *Stacpoole v. Stacpoole*, 4 Dow. 209; *Crackelt v. Bethune*, 1 J. & W. 586; *Baker v. Carter*, 1 Y. & C. 252, *per Lord Abinger*, C. B.; *Hide v. Haywood*, 2 Atk. 120; *Wilson v. Wilson*, 2 Keen, 249; *Attorney-General v. Wilson*, Cr. & Ph.

nacy (*j*), be the immediate cause why the suit was instituted, \* the trustee, on the charge being substan- [\*990] tiated against him, must pay the costs of the proceedings which his own improper behaviour occasioned; and of course if the trustee be decreed to pay the costs personally, he cannot afterwards deduct them from the trust fund in his hands (*a*). [So, if an executor or trustee improperly institute an action to administer the estate or execute the trust, the Court will not allow its process to be used as an instrument of oppression, but will make the plaintiff personally bear all the costs of the action (*b*); and under the new rules, if an administration action be rendered necessary solely by the neglect of the trustee to furnish accounts, the decree should be so framed as to enable the Court to throw the whole costs of the action on the trustee (*c*). But the right of a trustee to his costs rests substantially upon contract, and can only be lost or curtailed by such inequitable conduct as amounts to a violation or culpable neglect of his duty under the contract (*d*), and his costs accordingly are not "by law left to the discretion of the Court;" and a trustee, if deprived of his costs, may, without the leave of the Court or judge making the order, appeal on the question of his costs only (*e*). Where, however, the settlement is itself set aside, the trustee has no claim to his costs as matter of right, as in that case there is no contract in existence, and accordingly he cannot appeal as to such costs (*f*).]

1; *Lyse v. Kingdon*, 1 Coll. 184; [*Thomson v. Eastwood*, 2 App. Cas. 215; *Heugh v. Scard*, 33 L. T. N. S. 659; 24 W. R. 51.]

(*j*) *Taylor v. Glanville*, 3 Mad. 178, per Sir J. Leach; *Smith v. Bolden*, 33 Beav. 202; *May v. Armstrong*, W. N. 1866, p. 233; *Jones v. Lewis*, 1 Cox, 199; *Earl of Scarborough v. Parker*, 1 Ves. jun. 267; *Kirby v. Mash*, 3 Y. & C. 295; *Thorby v. Yeates*, 1 Y. & C. C. C. 438; *Hampshire v. Bradley*, 2 Coll. 34; *Penfold v. Bouch*, 4 Hare, 271; and see *Burrows v. Greenwood*, 4 Y. & C. 251; *Hayhow v. George*, and *Southwell v. Martin*, 21 L. T. N. S. 135.

(*a*) *Attorney-General v. Daugars*, 33 Beav. 621.

[(*b*) *Re Cabburn*, 46 L. T. N. S. 848.]

[(*c*) *Re Hayter*, 32 W. R. 26.]

[(*d*) *Turner v. Hancock*, 20 Ch. D. 303; *Re Evans*, 26 Ch. D. 68, 65.]

[(*e*) *Cotterell v. Stratton*, 8 L.R. Ch. App. 295; *Farrow v. Austin*, 18 Ch. D. 58; *Turner v. Hancock*, 20 Ch. D. 303; *Re Sarah Knight's Will*, 26 Ch. D. 82; *Re Love*, 29 Ch. D. 348; but see *Taylor v. Dowlen*, 4 L.R. Ch. App. 697; *Re Hoskins's Trusts*, 6 Ch. D. 281.]

[(*f*) *Dutton v. Thompson*, 23 Ch. D. 278.]



11. **Where misconduct proved only in part.** — But where a bill was filed charging the trustee with a breach of trust both as to realty and personalty, and the charge failed as to the former but succeeded as to the latter, the Court said, it was scarcely possible to suppose that the trustee should be permitted to *have* his costs, but it would be injustice to make him *pay the whole costs*, as one part of the bill had failed, and he was therefore ordered to pay the costs of that part of the bill which had succeeded (*g*).

[12. **Costs of innocent trustee may be thrown on guilty trustee.** — Where two trustees are jointly and severally liable for a breach of trust committed by one of them, the other trustee being innocent, the Court may order the guilty trustee to repay to the innocent trustee the costs of the action to repair the breach of trust (*h*). Where a trustee acting honestly has invested the trust funds on improper securities but has made good the loss to the trust estate before judgment in an action to execute the trusts, he will be allowed his costs.<sup>1</sup>

[\*991] \*13. **Setting aside a purchase by trustees, and absence of fraud.** — Trustees for sale had purchased in the name of a trustee at an undervalue, but *without any imputation of fraud, and by auction*. As to so much of the suit as related to calling upon the trustees to submit to a resale, and the directions consequential thereon, the Court gave relief against the trustees *with costs*; but as to the accounts that must have been taken had the sale been unimpeachable, the trustees were allowed their costs (*a*).

14. **Mistake or slight neglect of the trustee.** — If the suit was occasioned by an innocent *mistake* of the trustee (such as an investment in good faith and without loss to the trust fund on a security not strictly correct (*b*)), the Court will

(*g*) *Pocock v. Reddington*, 5 Ves. 800; [*Re Sarah Knight's Will*, 26 Ch. D. 82.]

[(*h*) *Price v. Price*, 42 L. T. N. S. 626; *Wilson v. Thomson*, 20 L. R. Eq. 459.]

(*a*) *Sanderson v. Walker*, 13 Ves. 601.

(*b*) *Fitzgerald v. Fitzgerald*, 6 Ir. Ch. Rep. 145.

<sup>1</sup> *Peacock v. Colling*, 33 W. R. 528; 54 L. J. Ch. 743 C. A.

content itself with *not giving* him costs (*c*), or will punish him with *payment of part* of the costs only (*d*), or will even allow him his costs (*e*); [but an official liquidator who is a paid agent is not entitled to the same latitude in the matter of costs as a gratuitous trustee (*f*).]

15. **Administration suit mainly caused by a breach of trust.**—Though, as a general rule, where a trustee commits a *breach of trust* he must pay the costs of a suit to repair it, yet he will be entitled to his subsequent costs relating to the ordinary taking of the accounts (*g*).

16. **Misconduct of the trustee discovered in the progress of the suit.**—If the suit did not originate from any necessity of enquiring into the conduct of the trustee, but, in the course of the proceedings instituted upon other grounds, it appears the trustee has in some particular instance been guilty of a breach of trust, the Court will not award against the trustee the costs of the *whole* suit, but only of so much of it as connects itself with his misconduct, and as to the rest of the suit will allow him his costs (*h*).

17. **Clearance of default.**—The Court never gives costs to a defaulting trustee while he continues in default, but the Court says, “when you have paid in the balance found due from you, then you shall have your costs” (*i*). But a bankrupt [formerly ceased] from the date of the bankruptcy \* to be a debtor to the trust estate, and was [\*992] therefore entitled to his costs from the date of the bankruptcy (*a*).

(*c*) *O’Callaghan v. Cooper*, 5 Ves. 117; *Mousley v. Carr*, 4 Beav. 49; *Attorney-General v. Drapers’ Company*, Ib. 71; *Devey v. Thornton*, 9 Hare, 222; [*Ryan v. Nesbitt*, W. N. 1879, p. 100.]

(*d*) *East v. Ryal*, 2 P. W. 284.

(*e*) *Taylor v. Tabrum*, 6 Sim. 281; *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, Ib. 496; *Attorney-General v. Caius College*, 2 Keen, 150; *Bennett v. Atkins*, 1 Y. & C. 247; *Fitzgerald v. O’Flaherty*, 1 Moll. 347; *Attorney-General v. Drummond*, 2 Conn. & Laws. 98; *Royds v. Royds*, 14 Beav. 54.

[(*f*) *Re Silver Valley Mines*, 21 Ch. D. 381.]

(*g*) *Hewett v. Foster*, 7 Beav. 348; and see *Bate v. Hooper*, 5 De G. M. & G. 345; *Re King*, 11 Jur. N. S. 899.

(*h*) *Tebbs v. Carpenter*, 1 Mad. 290, see 308; *Newton v. Bennet*, 1 B. C. C. 359; *Pride v. Fooks*, 2 Beav. 430; *Heighington v. Grant*, 1 Ph. 600.

(*i*) *Birks v. Micklethwait*, 33 Beav. 409; *Watson v. Row*, 18 L. R. Eq. 680; [*Lewis v. Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *McEwan v. Crombie*, 25 Ch. D. 175.]

(*a*) *Bowyer v. Griffin*, 9 L. R. Eq. 340.

[18. **Where defaulting trustee a bankrupt.** — The liability of a trustee for his breaches of duty was, however, by the Bankruptcy Act, 1869, s. 49, continued notwithstanding his discharge, and there has been some conflict of opinion as to the right of a bankrupt trustee since that Act to his costs as from the date of the bankruptcy, but the better opinion seems to be that he is not entitled to such costs until he has made good his default (*b*). By the Bankruptcy Act, 1883 (*c*), the liability of a trustee for a breach of trust (except in cases of fraudulent breaches) is released by the order of discharge, and it follows that under that Act, except in cases of fraud, a bankrupt trustee will, as from the date of his discharge, be entitled to his costs.

19. **Apportioning costs in action against executor of defaulting executor.** — If an action be brought against the executor of a defaulting executor to administer the original testator's estate, the defendant's costs ought strictly to be borne, as to those incurred solely in reference to the original testator's estate out of that estate, as to those incurred in seeking relief against the defaulting executor out of his estate, and as to the remaining costs out of the two estates equally; but to avoid the complication and expense of thus apportioning the costs, the Court has allowed the defendant the costs of taking the account of the original testator's estate, and half the rest of his costs out of the original testator's estate (*d*).]

20. **Costs of discussing a doubtful point of law.** — An executor, instead of accumulating a fund as directed by the will, had improperly kept the balance in his hands; but, as the amount of costs had in great measure been occasioned by the enquiry what rule the Court ought to adopt with respect to the computation of interest, it was thought hard under the circumstances to fix the executor with payment of costs even relatively to the breach of trust; and therefore the Court gave no costs (*e*).

[(*b*) *Lewis v. Trask*, 21 Ch. D. 862; *Re Basham*, 23 Ch. D. 195; *McEwan v. Crombie*, 25 Ch. D. 175; *Secus, Clare v. Clare*, 21 Ch. D. 865.] [(*d*) *Re Griffiths*, 26 Ch. D. 465; and see *Palmer v. Jones*, 43 L. J. N. S. Ch. 349; *Re Kitto*, 28 W. R. 411.] [(*e*) *Raphael v. Boehm*, 13 Ves. 592.]

21. **Costs to be paid in part and received in part by the trustee.**—In one case, as to part of the suit, the trustee ought from his misconduct to have *paid* the costs, and, as to another, to have been *allowed* his costs; and the Court, by a kind of compromise, left each party to pay his own costs (*f*).

22. **Trivial misconduct.**—When the breach of trust is trivial, the Court may overlook it altogether, and give the trustee his own costs (*g*).

\*[23. **Action by representative of trustee to recover** [\*993] **the trust estate.**—If the representative of a trustee who has invested the trust estate on an unauthorised security, bring an action to recover the trust estate, he will not be allowed the costs of that action as against the *cestuis que trust*, but must look for such costs to the estate of the trustee (*a*).]

24. **Trustees protecting from parental influence.**—The Court watches with jealousy transactions between parent and child occurring shortly after the child has attained twenty-one, more especially when the transactions had their inception during minority, and trustees acting *bond fide* in refusing to convey under such suspicious circumstances will be entitled to their costs (*b*).

25. **Trustee instituting a suit for his private ends.**—If a trustee have a private interest of his own, separate and independent from the trust, and oblige the *cestui que trust* to come into a Court of equity merely to have some point relating to the trustee's private interest determined at the expense of the trust, that is such a vexatious proceeding in the trustee, that, for example's sake, he will be decreed to pay the whole costs of the suit (*c*).

26. **Trustee falsely denying the plaintiff's claims.**—If in a suit for an account the defendant states his belief that the plaintiff is considerably indebted to him, and after a long

(*f*) *Newton v. Bennet*, 1 B. C. C. 362.

(*g*) *Fitzgerald v. Pringle*, 2 Moll. 534; *Bailey v. Gould*, 4 Y. & C. 221, see 225; *Knott v. Cottee*, 16 Beav. 77; *Cotton v. Clark*, 16 Beav. 134; *Chugg v. Chugg*, W. N. 1874, p. 185.

[(*a*) *Gurney v. Gurney*, 48 L. T. N. S. 529.]

(*b*) *King v. King*, 1 De G. & J. 668, see 671.

(*c*) *Henley v. Philips*, 2 Atk. 48.

investigation it proves that the defendant is considerably indebted to the plaintiff, the trustee, thus daring the plaintiff to his account will be decreed to pay the costs (*d*). And if the balance be in favour of the trustee, but far below what he had stated, he will not be entitled to *have* his costs (*e*), or at least not the costs of the account itself (*f*).

27. **Trustee mis-stating his accounts.** — A trustee will be deprived of costs (*g*), or will even have to pay costs if he refuse to account (*h*), or if he wilfully mis-state the accounts (*i*), or if, by any chicanery in his answer, he keep the *cestui que trust* from a true knowledge of the accounts (*j*), or even if he has kept the accounts in a very confused manner (*k*). And an executor will be liable to pay costs if he deny assets, and the contrary be established against [\*994] him (*l*). But an executor is entitled \*to have the accounts taken under the direction of the Court, and, therefore, even where he had obstructed the taking of the accounts, he was not decreed to pay the costs, though he was not allowed to have his costs (*a*). But in another case, where he had unnecessarily and unjustifiably protracted the suit, and multiplied the costs by his litigiousness, he was ordered to pay the costs of a simple administration suit up to the hearing (*b*).

28. **Corporation pleading ignorance falsely.** — Where a corporation filling the character of trustees for a grammar school by their answer pleaded ignorance of the claims of

(*d*) *Parrot v. Treby*, Pr. Ch. 254; *Eglin v. Sanderson*, 3 Giff. 434.

(*e*) *Attorney-General v. Brewers' Company*, 1 P. W. 376.

(*f*) *Fozier v. Andrews*, 2 Jon. & Lat. 199.

(*g*) *Gresham v. Price*, 35 Beav. 47.

(*h*) *Boynton v. Richardson*, 31 Beav. 340; *Kemp v. Burn*, 4 Giff. 348; *Wroe v. Seed*, 4 Giff. 425; *Underwood v. Trower*, W. N. 1867, p. 83; [*Re Radclyffe*, 50 L. J. N. S. Ch. 317.]

(*i*) *Sheppard v. Smith*, 2 B. P. C. 372; and see *Flanigan v. Nolan*, 1 Moll. 86.

(*j*) *Avery v. Osborne*, Barn. 349; *Reech v. Kennegal*, 1 Ves. 123.

(*k*) *Norbury v. Calbeck*, 2 Moll. 461.

(*l*) *Sandys v. Watson*, 2 Atk. 80.

(*a*) *Re King*, 11 Jur. N. S. 899. [But under the Rules of the Supreme Court now in force, an executor instituting proceedings to have the accounts taken must, to entitle him to costs, be able to satisfy the Court that under all the circumstances of the case the institution of the action was reasonable. See Order 65, R. I.]

(*b*) *Talbot v. Marshfield*, 4 L. R. Eq. 661, 3 L. R. Ch. App. 622.

the charity, and the information was afterwards elicited from the documents scheduled to their answer, as the Court inferred from such conduct a disposition to obstruct and defeat the ends of justice, the corporation was decreed to pay the costs of the suit (*c*).

29. **Corporation suppressing documents.** — And a corporation similarly circumstanced was punished in the same manner where, the Court having directed the production of certain documents, it was afterwards discovered that a very material one had been suppressed (*d*).

30. **Trustee setting up title of his own.** — The costs of the suit will be cast upon the trustee, if, in his answer, he set up a title of his own, and make an ill defence (*e*); and he will not be allowed to *have* his costs if he set up any trust different to what it actually is (*f*); and where a trustee filed an improper answer he was not allowed the costs of the answer (*g*).

31. **Executor denying relationship of next of kin.** — An executor sued by the next of kin had put the plaintiffs to the proof of their relationship, and, the fact not admitting a doubt, the executor was fixed with the costs of the enquiry (*h*).

32. **Costs where interest given against executors.** — It was laid down as a rule by Lord Thurlow, that “where the Court is obliged to *give interest against executors* as a remedy for a breach of trust, costs against them will follow of course” (*i*); \* but Sir W. Grant said, “that was a [\*995] proposition to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest, which would not be cases for costs” (*a*); and

(*c*) Attorney-General v. Burgessess of East Retford, 2 M. & K. 35.

(*d*) Borough of Hertford v. Poor of same Borough, 2 B. P. C. 377.

(*e*) Loyd v. Spillett, 3 P. W. 344; Bayly v. Powell, Pr. Ch. 92; Willis v. Hiscox, 4 M. & Cr. 197; Attorney-General v. Drapers' Company, 4 Beav. 67; Attorney-General v. Christ's Hospital, Ib. 73; Irwin v. Rogers, 12 Ir. Eq. Rep. 159.

(*f*) Ball v. Montgomery, 2 Ves. jun. 191, see 199.

(*g*) Eddowes v. Eddowes, 30 Beav. 603.

(*h*) Lowson v. Copeland, 2 B. C. C. 156.

(*i*) Seers v. Hind, 1 Ves. jun. 204, and see Franklin v. Frith, 3 B. C. C. 433; Mosley v. Ward, 11 Ves. 581.

(*a*) Ashburnham v. Thompson, 13 Ves. 404.

the existence of any such rule has since been denied (*b*). The meaning of Lord Thurlow probably was, that where the suit was occasioned by the misconduct of the trustee, and the charge against him was shown to be well founded by the Court's fixing him with interest, the costs of the suit in that case would be consequential upon the relief (*c*).

(*b*) *Tebbs v. Carpenter*, 1 Mad. 308; *Woodhead v. Marriott*, C. P. Cooper's Rep. 1837-38, 62; *Holgate v. Haworth*, 17 Beav. 259; [*Re John Jones*, 49 L. T. N. S. 91.]  
(*c*) See *Mosley v. Ward*, 11 Ves. 582.

# \*APPENDIX.

[\*996]

## No. I.

### TRUSTEE RELIEF ACT.

10 & 11 VICT. CAP. 96.

*"An Act for better securing Trust Funds, and for the Relief of Trustees."*  
(22nd July, 1847.)

WHEREAS it is expedient to provide means for better securing trust funds, and for relieving Trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all trustees, executors, administrators, or other persons, having in their hands any monies *belonging to any trust whatsoever* (a),

(a) The owner of an estate charged with a sum in favour of another is not a trustee of that sum within the Act, for he has not the monies in his hands; and if it were held otherwise, the money might be paid into Court, and the incumbrancer would have to bear the costs of getting it out, whereas the nature of a charge is that the beneficiary is entitled to have it raised out of the estate together with the costs of raising it; *Re Buckley's Trusts*, 17 Beav. 110; and see *Re Cooper's Legacy*, 17 Jur. 1087; *Warburton v. Cicognara*, 3 I. R. Eq. 592. But see *Trustee Act, 1850*, sect. 48.

It has been thought that where there is a power of sale without a power of signing receipts for the purchase-money, the purchaser may take

the estate under the power of sale and pay the purchase-money into Court under the *Trustee Relief Act*; *Cox v. Cox*, 1 K. & J. 251. See *Trustee Act, 1850*, sect. 48.

A sum of money was payable by instalments, and the trustee after receiving one instalment paid it into Court, and on a petition of the *cestui que trust* the Court not only administered the instalment paid in, but also gave directions to the trustee as to the future instalments; and said the order would give ample indemnity to the trustee; *Re Wright's Settlement*, 1 Sm. & Giff. App. v. The Court had, in fact, no jurisdiction as to the instalments payable in future, and the order would be an indemnity in this sense only, that the trustee would be acting in a way which had



received the sanction of the Court extra-judicially. See *Re Lloyd's Trusts*, 2 I. R. Eq. 507; and see *Trustee Act*, 1850, s. 31; and *Re Fortune's Trusts*, 4 I. R. Eq. 351.

[Trustees of charitable funds have a strict right to pay their trust money into Court and relieve themselves of the trust, without giving notice to the Charity Commissioners, notwithstanding the 17th section of the Charitable Trusts Act, 1853, but their proper course is to apply first to the Commissioners; *Re Poplar and Blackwall Free School*, 8 Ch. D. 543.]

Where money in which a lunatic is interested has been paid into Court, the Lord Chancellor, Lords Justices, or Master of the Rolls, or any Vice-Chancellor [under the old practice had, and under the present practice a Judge of the High Court] has jurisdiction under the Act to order repayment to the *Poor Law Guardians* of the expenses incurred by them for the support of the lunatic; *Re Upfull's Trust*, 3 Mac. & G. 281; *Re Coleman's Trust*, 14 L. T. N. S. 587; *Re Parker*, 2 W. R. 139; *Re Ward's Estate*, 2 W. R. 406; *Re Drewery's Trust*, 2 W. R. 436; *Re Buckley's Trust*, Johns. 700; or [in the case of a lunatic not so found by inquisition] to order the maintenance of the lunatic; *Re Sturge's Trusts*, 5 Jur. N. S. 423; *Re Burke*, 2 De G. F. & J. 124; 6 Jur. N. S. 717; *Re Law*, 7 Jur. N. S. 410; *Re Perry's Trusts*, 31 L. T. N. S. 775; 23 W. R. 335. [*Re Whitby's Trust*, W. N. 1877, p. 208.

If a lunatic is entitled to a fund which has been paid into Court under the Act, the Court has jurisdiction upon a petition presented in the Chancery Division under the Act and in lunacy to make an immediate order for the transfer of the fund to the account of the lunatic; *Re Tate*, 20 Ch. D. 135.]

Monies due upon a *policy* may be paid under the Act into Court by an insurance company: United Kingdom Life Assurance Company, 34 Beav.

493; *Re Hall*, 10 W. R. 37; *Re Webb's Policy*, 2 L. R. Eq. 456; and the company will be entitled to their costs, as between solicitor and client; *Re Webb's Policy*, 2 L. R. Eq. 456; *Re Cobbe*, 15 W. R. 29; *Re Haycock's Policy*, 1 Ch. D. 611. But in the last case the late M. R. observed that the Trustee Relief Act does not enable assurance companies to pay policy monies into Court after notice of conflicting claims, unless the policy monies were "monies belonging to some trust," in the words of the first section; S. C. [And in *Matthew v. Northern Assurance Company*, 9 Ch. D. 80, where the assurance company, in consequence of conflicting claims, paid the policy money into Court and contended that they were thereby discharged from all liability, the late M. R. held in an action by an assignee of the policy against the assurance company for the recovery of the policy money, that the company were only stakeholders in a limited sense; that the relation between them and the policy holder was that of debtor and creditor; that there was no trust or constructive trust such as to entitle them to pay the money into Court under the Act; and that the payment into Court was no discharge.

But now by 36 & 37 Vict. c. 66, s. 25, subs. 6, power is given to any debtor trustee or other person liable in respect of a debt or chose en action, and who has received notice of any written assignment thereof, to pay the same into Court, in the case of any disputed claim, under and in conformity with the provisions of the Trustee Relief Act. But this section only applies where there has been an assignment in writing of the debt or chose en action; *Re Sutton's Trusts*, 12 Ch. D. 175.

Under the "Public Works Loans Act, 1875," 38 & 39 Vict. c. 89, s. 28, the secretary of the Public Works Loans Commissioners may pay into Court any surplus monies under the control of the Commissioners arising

\*or the major part of them, shall be at liberty (a), on filing an [\*997] affidavit shortly describing the instrument creating the trust (b) according to the \*best of their knowledge and belief, to pay the [\*998] same, with the privity of the Accountant-General of the High Court of Chancery, into the Bank of *England* (a), to the account of such Accountant-General in the matter of the particular trust (b) (describing

from the taking possession, lease, sale, mortgage, or other disposition under the act of any mortgaged property, as if he were a trustee.]

(a) Trustees are at *liberty* to pay in, but they are not *bound* to pay in, if they are willing to execute the trust without the aid of the Court; *Mountain v. Young*, 18 Jur. 769; and see *Handley v. Davies*, 5 Jur. N. S. 190.

(b) The *affidavit* must not go into the whole history of the trust, so as to show upon the accounts how the particular sum arose, or the trustee will be deprived of his costs; *Re Waring*, 16 Jur. 652. All the trustees should properly join in the affidavit as all may have some information to contribute, but under particular circumstances the Court (as the Act is silent who is to make the affidavit) will order the Paymaster-General to receive the money on the affidavit of one of several co-trustees; — *v.* —, 1 Jur. N. S. 974.

(a) The payment into Court may of course be made without an order of the Court; *Re Biggs*, 11 Beav. 27. And annuities or Stocks of the Bank of England, or of the East India Company, or South Sea Company, or Government or Parliamentary securities, may be transferred into Court without an order, but *private securities* can only be deposited under the Trustee Relief Amendment Act, 12 & 13 Vict. c. 74, by an order to be made on petition. [But see *Re Ross's Trusts*, 28 W. R. 418, where V. C. Malins held that Railway Stock might be transferred into Court under the Trustee Relief Act.]

*Notice* of the payment into Court must by the general orders be given to the persons named in the affidavit

as interested; but if a person interested cannot be found the notice may, by leave of the court, be dispensed with; *Re Hansford*, 7 W. R. 199; [*Re Whitaker's Trusts*, 47 L. T. N. S. 507; 31 W. R. 114;] and where the parties are extremely numerous, the Court may give leave to substitute notice on some of them; *Re Colson's Trust*, 2 W. R. 111.

Where a person interested in the fund was *not named* as such in the affidavit upon which the money was paid into Court, it was held that he could not make his claim upon petition, but the Court gave him leave to file a bill; *Re Jephson*, 1 L. T. N. S. 5. But this case has not been followed in subsequent practice. [See *Re Puttrell's Trusts*, 7 Ch. D. 647; *Pelling v. Goddard*, 9 Ch. D. 185.]

When an executor, after paying money into Court, discovered *debts* of the testator, he was allowed to have the money paid back to him out of Court on his undertaking to apply it properly; *Ex parte Tournay*, 3 De G. & Sm. 677.

(b) The money must not be paid in by an executor to an account "the trusts of the testator's will," for this implies not a particular trust, but a general administration of the testator's estate. The executor must take on himself the responsibility of severing the fund from the testator's assets and appropriating it to the particular purpose, and then pay it in to the limited account. If it has already been paid in to an account too general for the Court to deal with, it may be carried over to the correct account, and the Court will then proceed to adjudicate upon the rights of the parties; *Re Joseph's Will*, 11 Beav. 625;

the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it), in trust to attend the orders of the said Court (c); and that all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of *England* or of the *East India Company* or *South Sea Company*, or any *Government* or *Parliamentary securities* (d) [\*999] standing in their names (e), or in the names \* of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-General, with his privy, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said Court; and in every such case the receipt of one of the cashiers of the said Bank for the money so paid, or in the case of stocks or securities the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited (c).

*Re Everett*, 12 Beav. 485; *Re Wright's Will*, 15 Beav. 367; *Re Robinson's Trust*, 1 Jur. N. S. 750; *Re Coulson's Trust*, 4 Jur. N. S. 6; *Re Godfrey's Trust*, 2 Ir. Ch. Rep. 105; and see *Re Monahan*, 8 I. R. Eq. 353. If the fund has been paid to the account of the testator's estate, and in the matter, &c., the Court will not proceed without the presence of the personal representative and his admission of assets; *Re Edward's Estate*, 4 W. R. 801. As to the proper heading of the account, see further, *Re Jervoise*, 12 Beav. 209; *Re Tillstone's Trusts*, 9 Hare, App. lix; and see Appach on the Acts, p. 44.

(c) The *County Courts* have now jurisdiction where the sum does not exceed 500*l.*; 28 & 29 Vict. c. 99, s. 1.

(d) The Act does not extend to the bonds of a *foreign Government*; *Re Lloyd's Trust*, 2 W. R. 371.

(e) Where stock is standing in the joint names of a deceased and surviving trustee, the survivor may transfer into Court under the Act; *Re Parry*, 6 Hare, 306.

(a) The payment into Court is a *discharge* only as to the money paid in, and leaves the trustee liable to a

suit in respect of the costs deducted by him, or in respect of any other monies that might be recovered upon the footing of the trust; see *Beaty v. Curson*, 7 L. R. Eq. 194; *Goode v. West*, 9 Hare, 378; *Re Jephson*, 1 L. T. N. S. 5; *Attorney-General v. Alford*, 2 Sm. & G. 488; *Thorp v. Thorp*, 1 K. & J. 438; and the trustee cannot require a fund to be kept in Court to indemnify him against threatened proceedings; *Re Wright's Trusts*, 3 K. & J. 419; and see *England v. Lord Tredegar*, 35 Beav. 256.

Trustees by paying money into Court retire from their trusts, and cannot thereafter exercise the powers of the trust; *Re Coe's Trust*, 4 K. & J. 199; *Re Williams's Settlement*, 4 K. & J. 87; *Re Tegg's Trusts*, 15 L. T. N. S. 236; 15 W. R. 52; [*Re Mulqueen's Trusts*, 7 L. R. Ir. 127;] and come under the usual words of "Trustees desirous of being discharged," so as to call into operation a power of appointing new trustees in that event; *Re Bailey's Trust*, 3 W. R. 31.

Trustees, if they pay into Court, should pay in the *whole* fund, and if they do not, then, unless there be mis-

II. And be it enacted, That such orders as shall seem fit (*b*) shall be from time to time made by the High Court of Chancery in respect of the trust monies, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment (*c*) and payment (*d*) of any such \*monies, or of any dividends or interest on any such stocks [\*1000] or securities, and for the transfer and delivery of any such stocks and securities, and for the administration of any such trusts generally, upon a petition (*a*) \*to be presented in a summary way [\*1001] to the Lord Chancellor or the Master of the Rolls, without bill,

take or some ground of justification, they will bear the costs of accounting for the balance; *Mitchell v. Cobb*, 17 L. T. 25. But trustees may deduct the reasonable costs of the payment into Court where no dispute has arisen or is likely to arise as to the deduction; *Beaty v. Curson*, 7 L. R. Eq. 194; and see *Re Fortune's Trusts*, 4 I. R. Eq. 351.

(*b*) Where the Court is not satisfied as to the facts by affidavit, it will, before making an order direct an enquiry; *Re Wood's Trusts*, 15 Sim. 469; and see *Re Sharpe's Trust*, 15 Sim. 470.

The Court has a discretion to be governed by the circumstances of the case, and, therefore, where money belonging to a lunatic found such in France was paid into Court, and the French curator (in whom by the French law the property became vested for the maintenance of the lunatic) applied for payment of the fund to himself, the Court refused to transfer the capital, and directed payment to him of the dividends only; *Re Garnier*, 13 L. R. Eq. 532.

(*c*) The Court has ordered an investment in *New Three per Cent. Bank Annuities*; *Re Dunster's Trusts*, 3 W. R. 267.

Where trustees were empowered with the consent of the tenant for life to invest in shares of railway companies guaranteed by the Indian Government, and the money was paid into Court under the Act, the Court declined to sanction such an investment, but offered to appoint new

trustees and transfer the fund to them, with an intimation that the trustees had power to make the investment; *Re Sillar*, W. N. 1871, p. 3.

(*d*) The Court has ordered payment of income to the first tenant for life, and by the same order, on proof of his death to the Accountant-General, to the next tenant for life; *Re Brent's Trust*, 8 W. R. 270.

(*a*) The application must be made by petition, [*Pelling v. Goddard*, 9 Ch. D. 185;] and cannot be made upon motion; *Re Masselin's Will*, 15 Jur. 1073; *Ex parte Stock*, 5 Ir. Ch. Rep. 341; nor by an order on further directions in a cause; *Otte v. Castle*, 1 W. R. 64; but see *Dixon v. Morley*, W. N. 1869, p. 40; [*Davies v. Davies*, 1 Set. on Decrees, 496, 4th edit.;] nor, except where the [money or securities in Court do not exceed 1000*l.* or 1000*l.* nominal value (see Rules of the Supreme Court, 1883, Order 55, Rule 2 (5).)] upon a summons at Chambers. But when an order has been once made upon a petition in compliance with the Act, so as to found the jurisdiction, any further proceedings may be at Chambers. *Re Hodges*, 4 De G. M. & G. 491; and see *Re Tracey's Trusts*, (under the Irish Act), 6 I. R. Eq. 271; [and where an order directing inquiries is made in Court upon a petition the further hearing of the petition may be adjourned into Chambers; *Re Moate's Trusts*, 22 Ch. D. 635.]

The trustees themselves (see Order 6, p. 1006, *post*) are competent to present the petition, but they are not the

by such party or parties, as to the Court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the Court shall see fit and direct (a); and every

proper persons, and if they present the petition the Court will not allow them more than respondent's costs; *Re Cazneau's Legacy*, 2 K. & J. 249; *Re Hutchinson's Trusts*, 1 Dr. & Sm. 27. [And see *Re Poplar and Blackwall Free School*, 8 Ch. D. 543.]

In one case the trustees, after paying in, applied by petition to have the fund distributed as in an administration suit, and the Court directed proper enquiries accordingly as to the persons interested; *Re Trower's Trust*, 1 L. T. N. S. 54.

The petition should set out the material statements of the affidavit under which the money is paid in, as the affidavit is regarded as a declaration of the trust to which the attention of the Court is to be called; *Re Levett's Trust*, 5 De G. & Sm. 619; *Re Flack's Will*, 10 Hare, App. xxx. But the petition must not set out the affidavit *in extenso*, or at a needless length; *Re Curtois*, 17 Jur. 852; 10 Hare, App. lxiv., and see *ante*, p. 997, note (b).

Where a petition stands over for amendment, by adding a next friend on behalf of the petitioner, it is not necessary to have the petition re-answered; *Re Medow's Trusts*, 10 Jur. N. S. 536.

[A petition is the proper means of obtaining a stop order, where the fund is over £1000 (see *supra*), and the application for it is the first application after the payment into Court; *Re Day's Trusts*, 49 L. T. N. S. 499.]

A claimant may proceed in *forma pauperis* under the Act; *Re Money*, 13 Beav. 109.

A trustee who did not concur with his co-trustees in paying the money into Court, must still be served with any petition under the Act; *Re Bryant's Settlement*, W. N. 1868, p. 123.

Where an *infant* is to be served, a

guardian *ad litem* should be appointed; *Re Ward's Will*, 2 Giff. 122; *Re Gillman's Trusts*, 1 I. R. Eq. 342. Under the Irish Act, guardians *ad litem* to infants are appointed upon motion; *Re Bennett's Trusts*, 6 I. R. Eq. 337.

The Court will declare the rights of parties upon a petition under the Act; *Re Walker's Trusts*, 16 Jur. 1154. And where the petitioner, as it turns out, is not himself entitled, the Court, if it be necessary to declare the rights, and the trustees desire the opinion of the Court, will declare the rights and give all the parties their costs, as in a suit under similar circumstances; *Re Woollard's Trust*, 18 Jur. 1012.

A petition may be presented by a person entitled to an *aliquot share* without bringing the other parties interested before the Court; *Re Bedford's Will*, 21 L. T. 164. A petition by a person, so entitled, should ask that the other shares should be carried to the separate accounts of the other persons entitled, in order to save the expense of serving the petition on any future application; *Re Hawke's Trust*, 18 Jur. 33. See *Re Young*, 5 W. R. 400. Or liberty may be given to the other parties entitled to apply at *chambers*; *Winkworth v. Winkworth*, 32 Beav. 233; and see *Re Tracey's Trusts*, 6 I. R. Eq. 271.

Where the claimants to the fund in opposition to the petitioner reside *abroad*, the Court will give them time to make out their case; *Re Hodson's Will*, 22 L. J. N. S. Ch. 1055.

(a) See [Orders 7 and 8 of Chancery Funds Amended Orders, 1874,] *post*, 1006.

[Where on the hearing of a petition class enquiries were directed, and the chief clerk made a certificate finding who were the persons interested in arguing the question in dispute, but several of those persons

order made upon such petition shall have the same authority and effect, and shall be enforced and subject to re-hearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court (b), and if it shall \*appear that any such [\*1002] trust funds cannot be safely distributed without the institution

were not respondents, the petitioner was authorised by the Court to serve a copy of the petition, the order made on the first hearing, and the certificate, on those persons, and the hearing of the petition was adjourned to give the persons served an opportunity of appearing; *Re Battersby's Trusts*, 10 Ch. D. 228.]

It was intimated by V. C. Wood, on a petition by tenant for life for payment of the income, that for the future he should hold it unnecessary to serve the remainderman; *Re Whitting's Settlement*, 9 W. R. 830; and see *Ex parte Peart*, 17 L. J. N. S. Ch. 168. And where the corpus was only carried over to a particular account, service on the remaindermen, who were extremely numerous, was dispensed with; *Re Hodges*, 6 W. R. 487; and in another case the Court gave no costs to the remainderman, who, the Court said, merely came to look after his own interests; *Re Thornton's Trust*, 9 W. R. 475.

When money has been paid into Court, and part of it has, by an order of the Court, been carried to the separate account of a *cestui que trust*, the trustees need not be served again on application by the *cestui que trust* to have it paid out of Court; *Re Young*, 5 W. R. 400.

If the trustee try to avoid service, the Court on being satisfied of the fact will make the order without service; *Ex parte Baugham*, 16 Jur. 325.

Where the trustees had not been heard of for ten years, and the place named for service in the trustee's affidavit had been pulled down, the Court dispensed with service on the trustees, but directed an enquiry at chambers who were the persons en-

titled; *Re Bolton's Will*, 18 W. R. 56; 21 L. T. N. S. 413.

It has been held under the Irish Act, 11 & 12 Vict. c. 68, which is similarly worded, that the Court has no jurisdiction to order service upon a person out of the jurisdiction; *Ex parte Crawford*, 2 Ir. Ch. Rep. 573; *Ex parte Bernard*, 6 Ir. Ch. Rep. 133. In *Re Bonelli's Electric Telegraph Company*, 18 L. R. Eq. 655, V. C. Bacon ordered a substituted service, and also service abroad. But in *Re Haney's Trusts*, W. N. 1874, p. 221, the V. C. expressed a doubt as to service abroad, as the M. R. had previously decided in *Re Mewburn's Settled Estates* (22 June, 1874) that this could not be done. However, the L. J.J. adopted the view of V. C. Bacon, and ruled that the Court has jurisdiction to order service abroad; *Re Haney's Trusts*, 10 L. R. Ch. App. 275; [and this view has since been acted on by the late M. R. in *Re Morant's Trusts*, W. N. 1879, p. 144; and followed in Ireland, *Re Dunne's Trusts*, 1 L. R. Ir. 12.] And see *Re Gethin*, 9 I. R. Eq. 512.

(b) The Court under this Act has as ample jurisdiction as in a suit, and may therefore declare the *validity* or *invalidity* of a deed without directing fresh proceedings, if the Court in the exercise of its discretion do not think a suit necessary; *Lewis v. Hillman*, 3 H. L. C. 607; or may order a deed to be rectified; [*Re Bird's Trusts*, 3 Ch. D. 214.] But in general the Court will not allow a deed to be impeached upon the petition without a suit; *Way's Settlement*, 10 Jur. N. S. 1166. In one case V. C. Wood, in disposing of a fund on petition, said that if there were creditors or other unascertained claims, a suit might be

of one or more suit or suits, the Lord Chancellor or Master of the Rolls may direct any such suit or suits to be instituted (a).

necessary, but that otherwise the Court had jurisdiction as in a suit, and might direct an issue to try a question of *sanity* or the like; *Re Allen's Will*, Kay App. li. Where trustees of a marriage settlement had transferred the fund into Court, and a petition was presented by a person claiming adversely to the settlement, V. C. Wood disposed of the case upon the petition, no party having objected; but before the Lords Justices, the respondent not consenting, the petition was ordered to stand over that a bill might be filed; *Re Fozard's Trust*, 1 K. & J. 233; 24 L. J. N. S. Ch. 441; and see *Re Bloye's Trust*, 2 H. & Tw. 140; 1 Mac. & G. 488; *Ex parte Stutely*, 1 De G. & Sm. 703.

An order made by the Court for maintenance of an infant out of a fund paid into Court, and to which the infant is entitled, constitutes the infant a *ward of Court*; *Re Hodges's Settlement*, 3 K. & J. 213; [and see *De Pereda v. De Mancha*, 19 Ch. D. 451; *Brown v. Collins*, 25 Ch. D. 56.]

(a) The Court directs a suit for its own satisfaction only, and will not authorise the petitioner to commence an action because it may be the more convenient course for making out his title; *Re Harris's Trust*, 18 Jur. 721. Though a person be not named as a *cestui que trust* in the affidavit upon which the money was paid in, yet if he can make a *primâ facie* case, the Court will give him leave to bring an action; *Re Jephson*, 1 L. T. N. S. 5.

When a trustee filed a bill instead of paying in under the Trustee Relief Act, the Court allowed him only such costs as he would have been entitled to had he paid in under the Act; *Wells v. Malbon*, 31 Beav. 48; and see *Gunnell v. Whitear*, 10 L. R. Eq. 664.

The following is a summary of

the decisions in reference to costs under the Act:—

The trustee who is served with the petition is *primâ facie* entitled to his costs; *Re Erskine's Trust*, 1 K. & J. 302; *Croyden's Trust*, 14 Jur. 54; *Re Wylly's Trusts*, 28 Beav. 458; *Re Wright's Trusts*, 3 K. & J. 419; *Re Headington's Trust*, 27 L. J. N. S. Ch. 175; *Re Robertson's Trust*, 6 W. R. 405; and it is not thought desirable to hold too strict a hand over trustees paying in trust monies; *Re Wylly's Trust*, 6 Jur. N. S. 906; *Re Brocklesby*, 29 Beav. 652; *Re Bendyshe*, 3 Jur. N. S. 727; though it is not matter of course that they should have their costs; *Re Elgar*, 11 L. T. N. S. 415; *Re Lane's Trust*, 24 L. T. 181; and see *Hankey v. Morley*, 4 Jur. N. S. 234; *Handley v. Davies*, 5 Jur. N. S. 190.

[But a trustee is within Rule 27 (19) of Order 65 of the Rules of the Supreme Court, 1883, and if he has been tendered and has accepted 30s. for his costs, he will not be allowed his costs of appearing on the petition, if he comes merely to ask for his costs, and his appearance is otherwise unnecessary; *Re Sutton*, 21 Ch. D. 855.]

In Ireland the costs of lodging a trust fund in Court are restricted in ordinary cases to 8l. *Re Boyd's Trusts*, 1 Ir. Rep. Eq. 489. And if they retain more they may be deprived, in consequence, of their costs of appearing on the petition; *Re Blayney's Trust*, 9 I. R. Eq. 413.

A trustee objected to act with a proposed new trustee of whom he disapproved, and on the appointment of such new trustee the old trustee paid the fund into Court, and was allowed his costs; *Re Williams's Trust*, 6 W. R. 218.

A trustee holding a *chose en action* to which a married woman is entitled,

\*IV. And be it enacted, That the Lord Chancellor, with the [\*1003] assistance of the Master of the Rolls or of one of the Vice-Chan-

is justified, having regard to her right to a settlement, in paying it into Court; *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts's Trusts*, 38 L. J. N. S. Ch. 708.

But a trustee who, after accepting the trust, throws it up from caprice soon after, and pays the money into Court, will not have his costs of appearing on the tenant for life's petition; *Re Leake's Trusts*, 32 Beav. 135.

When the trustee has paid in the fund abusively, as in order to avoid an action about to be brought against him, he will have no costs; *Re Waring*, 16 Jur. 652; and *Re Fagg's Trust*, 19 L. J. N. S. Ch. 175. And on the other hand, where a trustee refuses in a proper case to pay the fund into court, and obliges the *cestuis que trust* to bring an action, the Court will not allow him all his costs of suit, but only such costs as he would have got had he paid the money into Court, and then the plaintiff had presented a petition; *Weller v. Fitzhugh*, 22 L. T. N. S. 567; *Gunnell v. Whitear*, 10 L. R. Eq. 664. And where he has transferred the fund into Court without sufficient reason, though he may be allowed his costs of the transfer, he will not be allowed the costs of appearing on the petition; *Re Covington's Trust*, 1 Jur. N. S. 1157; *Re Heming's Trust*, 3 K. & J. 40; and see *Croyden's Trust*, 14 Jur. 54; *Re Leake's Trusts*, 32 Beav. 135; and in cases of gross misconduct in paying in the fund, the Court has jurisdiction to throw upon the trustee personally the costs of the petition; *Re Woodburn's Will*, 1 De G. & J. 333; *Re Cater's Trust*, 25 Beav. 361, 366; *Re Knight's Trusts*, 27 Beav. 45; *Re Foligno's Mortgage*, 32 Beav. 131; *Re Glendenning*, W. N. 1867, p. 101; *Re Robert's Trusts*, 38 L. J. N. S. Ch. 708; *Re Wise's Trust*, 3 I. R. Eq. 590; *Re Elliott's Trusts*, 16 L. R. Eq.

194; [*Re Hoskin's Trusts*, 5 Ch. D. 229, 6 Ch. D. 281. But if a trustee is without sufficient reason deprived of his costs, he may *seemle* appeal for them; *Turner v. Hancock*, 20 Ch. D. 303, 307; disapproving, *Re Hoskin's Trusts*, *ubi supra*; and see *supra*, p. 990.]

If the person who pays in is the personal representative of a testator whose will creates the difficulty, the executor should take his costs of paying in the fund out of the testator's estate, but the subsequent costs come out of the fund; *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679; *secus*, however, if the trust fund has been severed from the testator's estate, and is paid in by a trustee and not by the executor; *Re Lorimer*, 12 Beav. 521; *Ex parte Lucas*, V. C. Knight Bruce, 6 July, 1849.

The Court cannot direct the costs to be paid out of another fund, also paid in by the trustee, but standing to a different account, though it may form part of the testator's residuary estate, and therefore be, *per se*, liable to costs; *Re Hodgson*, 18 Jur. 786; S. C. 2 Eq. Rep. 1083; nor out of the testator's residuary estate when it has not been paid in; *Re Bartholomew's Will*, 13 Jur. 380; and see *Re Sharpe's Trusts*, 15 Sim. 470; *Re Feltham's Trusts*, 1 K. & J. 534. But see *Re Trick's Trusts*, 5 L. R. Ch. App. 170. But where five-sixteenths of a fund paid into Court had lapsed, the Court threw the whole costs on the lapsed shares as constituting part of the residue; *Re Ham's Trust*, 2 Sim. N. S. 106.

If a trustee deducts his costs before paying in the fund, the Court has no jurisdiction as to the sum deducted; *Re Bloye's Trust*, 1 Mac. & G. 504; 2 Hall & Tw. 153; *Re Barber*, 9 Jur. N. S. 1098; *Re Fortune's Trusts*, 4 I. R. Eq. 361. But where



[\*1004] cellors, shall have \* power and is hereby authorised to make such

the trustee is allowed the costs of the petition, his costs will be taxed, including those which he had deducted; *Re Hue's Trusts*, 27 Beav. 337; and where a trustee has deducted costs improperly, an action may be brought against him for recovery of the costs so improperly deducted, and the costs of the action will be thrown upon the trustee; *Beaty v. Curson*, 7 L. R. Eq. 194.

It has been held, though the policy of the decision may be doubtful, that the trustee who is served with a petition will not be allowed in taxation the costs of taking copies of the affidavits filed by the parties beneficially interested; *Re Lazarus*, 3 K. & J. 555.

Whether on a petition by tenant for life for payment of the dividends the costs should come out of the corpus or out of the income is a point on which the practice has much varied. In favour of payment out of the corpus are the following cases: *Re Ross's Trust*, 1 Sim. N. S. 196, V. C. Cranworth; *Re Staples's Settlement*, 13 Jur. 273, 273, V. C. E.; *Re Field's Trusts*, 16 Beav. 146; *Re Butler's Trust*, 16 Jur. 324; and *Re Leake's Trusts*, 32 Beav. 135, Sir J. Romilly; and in support of the contrary view; *Ex parte Fletcher*, 12 Jur. 619; 17 L. J. N. S. Ch. 169; *Ex parte Peart*, 12 Jur. 620; 17 L. J. N. S. Ch. 168, V. C. Knight Bruce; *Re Lorimer*, 12 Beav. 521, Lord Langdale; *Re Bangley's Trust*, 16 Jur. 682; *Re Ingram*, 18 Jur. 811, V. C. Kindersley; *Re Jepson*, 6 March, 1859, V. C. Wood; and *Re Hamersley's Settlement*, 23 Beav. 267, Sir J. Romilly.

In other cases the costs have been divided, and the cost of the tenant for life thrown on the income, and the costs of the trustees and remainderman on the corpus; *Re Whitting's Settlement*, 9 W. R. 830; *Re Tchitchagoff's Will*, 12 W. R. 1100; *Re Hadland's Settlement*, 23 Beav. 266.

In *Re Turnley*, 1 L. R. Ch. App.

152, Lord Romilly wished the point in question to be submitted to the Lord Chancellor, who directed the costs to be paid out of the corpus.

But the costs cannot be thrown on corpus without service on the remainderman; *Ex parte Peart*, 17 L. J. N. S. Ch. 168; *Ex parte Fletcher*, 17 L. J. N. S. Ch. 169; or on those who sufficiently represent them; *Re Greenland's Trust*, 1 W. R. 46. And as the necessity of serving the remaindermen would lead to great inconvenience and expense, it was resolved by all the judges that for the future the costs of a petition for payment of dividends should be thrown upon the income, and service upon the remaindermen be dispensed with; *Re Marner's Trusts*, 12 Jur. N. S. 959, 3 L. R. Eq. 432; *Re Cameron*, 1 I. R. Eq. 258. The rule therefore now is, that upon a petition for payment of dividends only, while the costs, charges and expenses properly incurred by the trustee in paying the money into Court will, where not previously deducted, be directed to be paid out of the corpus (*Re Whitton's Trusts*, 8 L. R. Eq. 353), the costs of the petitioners and of all persons appearing on the petition will fall upon the income; *Re Mason's Trusts*, 12 L. R. Eq. 111; *Re Whitton's Trusts*, 8 L. R. Eq. 353. It was held in some cases, that the costs of the trustee's appearance upon the petition were an exception, and ought to be borne by the corpus (*Re Gordon's Trusts*, 6 L. R. Eq. 335; *Re Wood's Trusts*, 11 L. R. Eq. 155), but this has since been determined otherwise; *Re Evans' Trusts*, 7 L. R. Ch. App. 609; *Re Smith's Trusts*, 9 L. R. Eq. 374. "It is said," observed L. J. James, "that a difference ought to be made with respect to the appearance of the trustees, but I think that *Re Marner's Trusts* was intended to apply to all the costs of the petition; and I am the more disposed to follow that construction, be-

orders as from time to time shall seem necessary for better [\*1005] carrying the provisions of this Act into effect (a).

cause the reasonable course for a tenant for life to pursue, when about to present a petition, is to write to the trustee and tell him that he does not seek to affect the *corpus*, but only wants his income, and therefore that there is no occasion for the trustee to incur the costs of appearing. In such a case, if the title of the tenant for life be clear the trustee ought not to appear." But it was probably intended by the L. J. that the letter must be accompanied with the tender of a sufficient sum to cover the expense of the trustee's consulting his solicitor; [see now rule 27 (19) of Order 65 of Rules of the Supreme Court, 1883.]

If a person not appearing by the affidavit to have an interest, but who made a claim, be served with the petition and *disclaim* at the bar, he will not be allowed his costs; *Re*

*Parry's Trust*, 12 Jur. 615; *Re Smith*, 3 Jur. N. S. 659.

If the money was paid in from the unreasonable claim of a person who is served with and appears upon the petition, and *opposes* it, the Court has jurisdiction to throw the costs upon such wrongful claimant; *Re Armstrong's Trusts*, 4 N. R. 450; S. C. 4 De G. J. & S. 454.

If the petition be presented by an incumbrancer, whose debt will swallow up the whole fund, and be served on a subsequent incumbrancer with notice that his costs of appearing will be resisted, such subsequent incumbrancer, if he appear, will not have his costs; *Roberts v. Ball*, 24 L. J. N. S. Ch. 471.

The costs in all cases are in the discretion of the Court; *Roberts v. Ball*, 24 L. J. N. S. Ch. 471.

(a) [This section has become obsolete, and was repealed by 42 & 43 Vict. c. 78. The general rules and orders relative to this Act now in force are as follows:—

#### SUPREME COURT FUNDS RULES, 1884.

**RULE 41.** When a trustee or other person desires to lodge (1) funds in Court in the Chancery Division, under the Act 10 & 11 Vict. c. 96, he shall annex to the affidavit to be filed by him pursuant to the said Act a schedule in the same printed form as the lodgment schedule to an order, setting forth—

- (a) His own name.
- (b) The amount of money and description and amount of securities proposed to be lodged in Court.
- (c) The ledger credit to be opened in the Pay Office books, in the matter of the particular trust to which the funds are to be placed.
- (d) A statement whether legacy or succession duty (if chargeable) or any part thereof has or has not been paid.
- (e) A statement whether the money or the dividends on the securities so to be lodged in Court, and all accumulations of dividends thereon, are desired to be invested in any and what description of Government securities, or whether it is deemed unnecessary so to invest the same.

The paymaster on receipt of an office copy of such schedule (which is to be retained by him) shall issue the necessary direction for giving effect to such lodgment.

[(1) "Lodge in Court" means pay or transfer into Court or deposit in Court; see Rule 3.]

[\*1006] \* V. And be it enacted, That in the construction of this Act the expression "the Lord Chancellor" shall mean and include

**RULE 74.** When it is stated in the schedule to the affidavit made pursuant to Rule 41, that it is desired that any money to be lodged in Court, or the dividends accruing on any securities to be lodged in Court in pursuance of the Act 10 & 11 Vict. c. 96, and the accumulations thereof, shall be invested in any description of Government securities, the Paymaster shall (if or so soon as such money shall amount to or exceed £40, or so soon as dividends accruing on such securities shall amount to or exceed £10) invest the same accordingly, without any order or further request for that purpose. If such money does not amount to £40 (and is not less than £10), the Paymaster shall place such money on deposit without a request for that purpose, unless the said schedule contains a statement that it is deemed unnecessary to place such money on deposit, or unless notice in writing be left at the Pay Office of an order having been made, or of an intended application to the Court affecting such money, securities, or dividends. Dividends accruing on funds or on investments or accumulations of funds lodged in Court under the said Act prior to the commencement of the Chancery Funds Rules, 1872, may, when, or so soon as they amount to or exceed £10, be invested without request.

#### CHANCERY FUNDS AMENDED ORDERS, 1874.

**ORDER 5.** A person having made a payment or transfer of money or securities into, or a deposit of securities in Court under the above-mentioned Act of the 10th & 11th Vict. c. 96, shall forthwith give notice thereof to the several persons named in his affidavit (11) to be made in pursuance of Rule 34 of the Chancery Funds Consolidated Rules, 1874, and the said Act, as interested in or entitled to such money or securities (a).

**ORDER 6.** The persons interested in or entitled to any money or securities so paid or transferred into, or deposited in Court, in pursuance of the said Act of the 10th & 11th Vict. c. 96, and named in the affidavit, or any of such persons, or the person so paying or transferring into or depositing in Court may apply by petition, or, in cases where the fund does not exceed 300*l.* cash or 300*l.* in securities (b), by summons as occasion may require, respecting

[(11) Where the person mentioned in the affidavit could not be found, the Court declined to give any directions as to what would be sufficient notice, but intimated extra-judicially what, under the circumstances, would probably be held to be sufficient; *Re Hardley's Trusts*, 10 Ch. D. 664. It will be observed that, under the Supreme Court Funds Rules, 1884, which repealed the Chancery Funds Consolidated Rules, 1874, it is not necessary to state in the affidavit the names of the persons interested in or entitled to the fund, and this order, though not expressly repealed, has become inapplicable to the practice under the Rules of 1884; but in a case under

the recent Rules, *Pearson, J.*, in order to protect the trustees and prevent useless litigation, directed that notice of the affidavit should be served in the same way and upon the same parties as it would have been if the 34th Rule of the Chancery Funds Consolidated Rules, 1874, had remained in force; *Re Stening's Trust*, 50 L. T. N. S. 586.]

(a) Where a *cestui que trust* was believed to be in New York, but the address was unknown, the Court allowed publication in two New York papers to be sufficient notice: *Re Goodsman's Will*, W. N. 1870, p. 152.

[(b) Now extended by Rules of the Supreme Court, Order 55, R. 2,

the Lord Chancellor, Lord Keeper, and Lords Commissioners for the custody of the Great Seal of *Great Britain* for the time being.

the investment, payment out, or distribution of the money or securities, or of the dividends or interest of such securities.

ORDER 7. A person who has paid or transferred money or securities into, or deposited securities in Court pursuant to the said Act of the 10th & 11th Vict. c. 96, shall be served with notice of any application made to the Court, or a Judge in Chambers, respecting such money or securities, or the dividends thereof, by any person interested therein or entitled thereto.

ORDER 8. The persons interested in or entitled to such money or securities shall be served with notice of any application made by the trustee to the Court, or Judge, respecting such money or securities, or the dividends thereof (c).

ORDER 9. No petition relating to such money or securities as mentioned in the last four preceding Orders shall be set down to be heard, and no summons relating thereto shall be sealed until the petitioner or applicant has first named in his petition or summons a place where he may be served with any petition or summons, or notice of any proceeding or order relating to such money or securities, or the dividends thereof.

ORDER 10. Petitions presented and summonses issued under the said Act of 10 & 11 Vict. c. 96, shall be entitled in the matter of the said Act and in the matter of the particular trust.]

(5) to cases where the money or securities in Court do not exceed £1,000 or £1,000 nominal value.]

[(c) This notice may be dispensed with under special circumstances, as

where a person has gone abroad many years ago and has not since been heard of; *Re Whitaker's Trusts*, 47

L. T. N. S. 507; 31 W. R. 114; *Re Hansford*, 7 W. R. 199, 254.]

## TRUSTEE RELIEF AMENDMENT ACT.

12 &amp; 13 VICT. CAP. 74.

*"An Act for the further Relief of Trustees."* (28th July, 1849.)

WHEREAS difficulties have arisen in the transfer of securities vested in trustees in certain cases under the provisions of an Act passed in the Session of Parliament holden in the tenth and eleventh years of the reign of Her present Majesty, intituled *An Act for better securing Trust Funds, and for the Relief of Trustees*, and it is expedient to make further provision for carrying into effect the objects of the said recited Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if upon any petition presented to the Lord Chancellor or Master of the Rolls in the matter of the said Act it shall appear to the Judge of the Court of Chancery before whom such petition shall be heard, that *any monies, annuities, stocks or securities (a)* are vested in any persons as trustees, executors, or administrators, or otherwise, upon trusts within the meaning of the said recited Act, and that the *major part* of such persons *(b)* are desirous of transferring, paying, or delivering the same to the Accountant-General of the High Court of Chancery under the provisions of the said recited Act, but that for any reason the concurrence of the other or others of them cannot be had *(c)*, it shall be lawful for such Judge as aforesaid to order and direct such transfer, payment, or delivery to be made by the *major part* of such persons without the concurrence of the other or others of them; and where any such monies or Government or Parliamentary securities shall be deposited with any banker, broker, or other depositary, it shall be lawful for such Judge as aforesaid to make such order for the *payment or delivery* of such monies,

[(a) Under these words the debenture stock of a Railway Company, the consolidated stock of a Railway Company, and India 4 per Cent. stock have been ordered into Court; *Re Gledstane's Trusts*, W. N. 1878, p. 26.]

(b) Where of three trustees, one was invalided and two petitioned, the Court made the order; *Re Broadwood's Trust*, 8 L. T. N. S. 632.

(c) The non-concurring trustee must be served with any petition under the Act.

Government or Parliamentary securities, to \*the *major part* of [\*1008] such trustees, executors, administrators, or other persons as aforesaid, for the purpose of being paid or delivered to the said Accountant-General as to the said Judge shall seem meet; and every *transfer* of any annuities, stocks, or securities, and every *payment* of money or *delivery* of securities, in pursuance of any such order, shall be as valid and effectual as if the same had been made on the authority or by the Act of *all the persons* entitled to the annuities, stocks, or securities so transferred, or the monies or securities so paid or delivered respectively, and shall fully protect and indemnify the Governor and Company of the Bank of *England*, the *East India* Company, and the *South Sea* Company, and all other persons acting under or in pursuance of such order.

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By 28 & 29 Vict. c. 99, s. 1, it is enacted, that the County Courts shall have and exercise all the power and authority of the High Court of Chancery "in all proceedings under the Trustees Relief Acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value 500*l.*"

And by 30 & 31 Vict. c. 142, s. 24, it is enacted, that "any monies, annuities, stocks, or securities vested in any persons as trustees, executors, administrators or otherwise, upon trusts, within the meaning of" (the Trustee Relief Act), "where the same does not exceed in amount or value the sum of 500*l.*, upon the filing by such trustees or other persons, or the major part of them, to or with the Registrar of the County Court within the district of which such persons or any of them shall reside, an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge, may in the case of money be paid into a *Post-office Savings Bank* established in the town in which the County Court is held, in the name of the Registrar of such Court, in trust, to attend the orders of the Court," and "in the case of stocks or securities may be transferred or deposited into or in the name of the *Treasurer and Registrars* of such Court, in trust, to attend the order of the Court," &c,

## TRUSTEE ACT, 1850.

13 &amp; 14 VICT. CAP. 60.

*"An Act to consolidate and amend the Laws relating to the Transfer of Real and Personal Property vested in Mortgagees and Trustees."* (5 August, 1850.)

WHEREAS an Act was passed in the first year of the reign of His late Majesty King William the Fourth, intituled *An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases*: And whereas an Act was passed in the fifth year of the reign of His late Majesty King William the Fourth, intituled *An Act for the Amendment of the Laws relative to Escheats and Forfeitures of Real and Personal Property holden in Trust*: And whereas an Act was passed in the second year of the reign of Her present Majesty, intituled *An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgages*: And whereas it is expedient that the provisions of the said Acts be consolidated and enlarged, — Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same (a).

I. (*This section was repealed by "The Statute Law Revision Act, 1875."*)

II. And, whereas it is expedient to define the meaning in which certain words are hereafter used: It is declared that the several words hereinafter named are herein used and applied in the manner following respectively: (that is to say),

The word "lands" shall extend to and include manors, messuages, \*tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein (a):

(a) The Court has no jurisdiction under the Trustee Acts to decide on a disputed question of title; *Re Draper's Settlement*, 9 W. R. 805.

(a) In one case, where the word "lands" only was used in the vesting

order, and the property comprised *rent-charges*, the order was amended by adding the word "hereditaments;" *Re Harrison*, 1 Set. on Dec. 510, 4th edit.

The word "stock" shall mean any fund, annuity, or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (b):

The word "seised" shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity (c), in possession or in futurity, in any lands:

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands:

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The words "convey" and "conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another lands whereof such person is seised, or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an Act passed in the fourth year of the reign of His late Majesty King William the Fourth, intituled *An Act for the abolition of Fines and Recoveries, and the substitution of more simple modes of Assurance* (d), and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform

\*preparatory to or in aid of a complete assurance of such [\*1011] customary or copyhold lands (a):

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act

(b) The word stock includes shares in joint-stock companies; *Re Angelo*, 5 De G. & Sm. 278; and shares in ships, 18 & 19 Vict. c. 91, s. 10.

(c) In suits where all parties beneficially interested are before the Court, it is sufficient for the purchaser to take a conveyance of the legal estate, for the equities of the parties are bound by the order of sale, and no vesting order as to the equitable estate is required or will be made; *Re Williams's Estate*, 5 De G. & Sm. 515. See the analogous case under the prior Act,

*Goddard v. Macaulay*, 6 Ir. Eq. Rep. 221.

(d) Thus, where there is an adult tenant for life with remainder to an infant tenant in tail with remainders over, a vesting order of the infant's estate with the consent of the tenant for life as protector will bar the entail, and all remainders over; *Powell v. Matthews*, 1 Jur. N. S. 973; see form of order, 1 Set. on Dec. p. 535, 4th edit.

(a) See, as to copyholds, *Rowley v. Adams*, 14 Beav. 130, and *post*, p. 1025, note (a).



for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of *Great Britain* as any Lord Keeper or Lords Commissioners of the Great Seal for the time being :

The words "Lord Chancellor of *Ireland*" shall mean as well the Lord Chancellor of *Ireland* as any Keeper or Lords Commissioners of the Great Seal of *Ireland* for the time being : .

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*b*) ; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts (*c*), and shall extend to and include cases

[\*1012] \* where the trustee has some beneficial interest or estate in the subject of the trust, and shall extend to and include

(*b*) As to the question upon the former Act, 1 W. 4, c. 60, whether the word "trust" included a "mortgage," see note (*c*), p. 836, 3d edit.

(*c*) A vendor, after a contract, has been held to be a trustee of shares in a joint-stock bank for the purchaser; *Re Angelo*, 5 De G. & Sm. 278. But in cases of *real estate*, if not universally, at least where the alleged trustee can possibly dispute the trust, the constructive trust must first have been declared by the decree of the Court, and the infant heir of the vendor who died intestate after having contracted to sell real estate is not a constructive trustee for the purchaser unless so declared by decree; *Re Carpenter*, 1 Kay, 418; *Re Burt*, 9 Hare, 289; *Re Dickenson*, 17 L. T. 231; *Cust v. Middleton*, 7 Jur. N. S. 151; *Re Weedling's Estate*, 4 Jur. N. S. 707; *Re Faulder*, W. N. 1866, p. 83; *Jackson v. Milfield*, 5 Hare, 538; *Re Milfield*, 2 Ph. 254; [*Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582.] *Re Wise*, 5 De G. & Sm. 415, is distinguishable; and see *Re Propert's Purchase*, 22 L. J. N. S. Ch. 948. But where a vendor died before acceptance of the title having devised the

estate to an infant, and the executors prayed that the infant might be declared a trustee within the Act, and that the property on payment of the purchase-money might be conveyed to the purchaser who had accepted the title, and the prayer was supported by the infant's counsel, the Court made the order; *Re Lowry's Will*, 15 L. R. Eq. 78. [This point is, however, not likely to arise in the future in the case of freeholds, as by the Conveyancing and Law of Property Act, 1881, s. 4, the personal representative of the vendor is empowered to convey, where at his death an enforceable contract is subsisting.]

If the owner of *copyholds* covenant to surrender, and declares that in the meantime he will stand seised upon trust for the covenantee, the covenantor is a trustee within the Act; *Re Collingwood's Trusts*, 6 W. R. 536; and see *Steele v. Waller*, 28 Beav. 466. And even where there is no such declaration, yet if the contract be not *in fieri*, but has been carried out and completed, the covenantor is a trustee within the Act; *Re Cuming*, 5 L. R. Ch. App. 72.

If the *cestui que trust* has sold his

the duties incident to the office of personal representative of a deceased person (a):

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon commission of enquiry in the nature of a writ *de lunatico inquirendo*:

The expression "person of unsound mind" shall mean any person *not an infant*, who, not having been found to be a lunatic, shall be incapable from infirmity of mind (b) to manage his own affairs:

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not an heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent:

The word "mortgage" shall be applicable to every estate, interest, or

*equitable interest*, and the sale has been *completed*, the purchaser is then the *cestui que trust*, and may apply for a transfer of the legal estate; *Re Wilkinson's Trust*, 10 Jur. N. S. 716; *Re Groom*, 11 L. T. N. S. 336.

Where a testator had signed an agreement to convey certain easements in compromise of an action, an infant devisee, no title being in question, was held to be a constructive trustee within the Act; *Re Taylor*, W. N. 1866, p. 5.

Where a *compulsory* sale had been made to a railway company, and the purchase-money had been *paid* and *possession* taken in the lifetime of the ancestor, the case was held to be within the Act; *Re Russell's Estate*, 12 Jur. N. S. 224; and see *Re Badcock*, 2 W. R. 386.

A vendor who refused to convey after tender of a deed *settled by the judge*, or to receive the purchase-money, was declared a trustee, and on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor; *Warrender v. Foster*, 1 Set. on Dec. 438, 4th edit.

An executor holding a legacy bequeathed to persons successively is a constructive trustee; *Re Davis's Trusts*, 12 L. R. Eq. 214.

[An infant who is the sole bene-

ficial owner of stock standing in his name, subject to a provision or direction for his maintenance which is vested in some other person, is a constructive trustee within the Act; *Gardner v. Cowles*, 3 Ch. D. 304.]

Where a *feme covert* is a trustee of stock, the *husband*, as the Bank acts upon his directions, is a constructive trustee within the Act; *Re Wood*, 7 Jur. N. S. 323. [See now 45 & 46 Vict. c. 75.]

An heir who takes by descent, but has bound himself on the doctrine of *election* to hold upon the trusts of the will, is a trustee within the Act; *Dewar v. Maitland*, 2 L. R. Eq. 834.

Three persons were appointed assignees of a bankrupt, and one of them resigned his office and went abroad, and his resignation was accepted by the creditors, and the Court held that the one who had resigned and gone abroad was a trustee within the Act; and an order was made for vesting the legal estate in the two acting assignees; *Re Joyce's Estate*, 2 L. R. Eq. 576; 12 Jur. N. S. 1015.

[(a) A trustee may by virtue of this definition be appointed to perform the duties of an executor; *Re Moore*, 21 Ch. D. 778.]

(b) See *Re Wakeford*, 1 Jon. & Lat. 2 (under 1 W. 4, c. 60); *Re Jones*, 6 Jur. 545.

property in lands or personal estate which would in a Court of equity be deemed merely a security for money :

The word "person" used and referred to in the masculine gender shall \*include a female as well as a male, and shall include a body corporate (a) :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

III. And be it enacted, that when any *lunatic* or person of unsound mind (b) shall be seised or possessed of any *lands* upon any *trust* (c) or by way of *mortgage* (d), it shall be lawful for the Lord Chancellor (e),

(a) By 25 & 26 Vict. c. 37, s. 10, the Trustee Act, 1850, is made to extend to a trustee or trustees of the *private estates* of Her Majesty, her heirs or successors, and any petition or other proceeding for obtaining the benefit of the Act shall be in the name or names of any person or persons authorised by any writing under the sign manual.

(b) Where the unsoundness of mind is *contested*, the case is not within the Act; *Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202.

(c) See definition of Trust, p. 1011.

(d) See definition of Mortgage, *ante*, p. 1012. [*Semble*, that the Court has no jurisdiction under this section to make an order for the transfer of a mortgage vested in a lunatic. The lunatic's interest may, however, be sold under sect. 116 of the Lunacy Regulation Act, 1853; *Re Brown*, 50 L. T. N. S. 373.]

(e) It was doubted whether the Lords Justices, though they were in fact intrusted under the Queen's sign manual with the care, &c., of lunatics, had power to exercise the jurisdiction given by the Act to the Lord Chancellor intrusted, &c.; *Re Waugh's Trust*, 2 De G. M. & G. 279; *Re Patinson*, 21 L. J. N. S. Ch. 280. See, however, 15 & 16 Vict. c. 87, s. 15, removing the doubt, and the 11th section of the Trustee Extension Act, *post*, p. 1044. [This jurisdiction of

the Lords Justices is now, by the 7th section of 38 & 39 Vict. c. 77, exercisable by such of the Judges of the High Court of Justice or Court of Appeal as are intrusted by the Queen's sign manual with the care, &c., of lunatics.]

In cases of *lunacy* or *unsoundness of mind*, the application must be made exclusively to the Judges so intrusted as aforesaid, as the other Judges have no jurisdiction; *Jeffries v. Drysdale*, 9 W. R. 428; *Re Ormerod*, 3 De G. & J. 249, and cases there cited; and see *Re Irby*, 17 Beav. 334; *Herring v. Clark*, 4 L. R. Ch. App. 167; *Re Mason*, 10 L. R. Ch. App. 273; [*Re Stamper*, 46 L. T. N. S. 372.]

As the section speaks of *conveyance* and *assignment*, the Court has no authority under it to vest a *power* though an imperative one; *Re Porter's Will*, 3 W. R. 583. See *post*, 1031.

[Where the person of unsound mind is tenant in tail, it is not necessary in the vesting order to refer to the Fines and Recoveries Act, or to the manner in which the trustee could have conveyed if sane. The order should simply direct the property to vest for all the estate which the person of unsound mind could convey if sane; *Mason v. Mason*, 7 Ch. D. 707.]

Where one of several trustees is a *lunatic*, and it is desired to obtain

intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, to make an order that such lands be \*vested (a) in such a person or persons (b) in such manner and [\*1014] for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment (c) of the lands in the same manner for the same estate (d).

IV. And be it enacted, that when any *lunatic* or person of *unsound* mind shall be entitled to any *contingent right* in any *lands* upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

V. And be it enacted, that when any *lunatic* or person of *unsound* mind shall be *solely* entitled to any *stock* or to any *chose en action* upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order vesting in any person or persons (e) the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any

from the Court an appointment of new trustees in the place of the *lunatic* and others with a vesting order, the petition should be intituled in Lunacy and in the Chancery Division; [*Re Pearson*, 5 Ch. D. 982; *Re Chell*, 49 L. T. N. S. 196;] *Re Davidson*, 20 L. J. N. S. Ch. 644. And see Trustee Extension Act, sect. 10.

As to a person "of unsound mind," who is an *infant*, see p. 1015, *post*, note (c).

As to the parties to be served, see p. 1033, *post*, note (c).

(a) The vesting order being a *conveyance*, should be so worded as to make it clear by the description what property passes; *Re Ord's Trust*, 3 W. R. 386.

Where the circumstances require a severance of the property, the Court will make two vesting orders instead of one general one; *Brader v. Kerby*, W. N. 1872, p. 174.

[(b) The Court will not on the petition of a person absolutely entitled vest the property in the person so entitled, but will appoint a new trustee and vest the property in him, leaving the petitioner to take further steps to put an end to the trust; *Re Holland*, 16 Ch. D. 672; but see *Re Currie*, 10 Ch. D. 93.]

(c) See definition of Conveyance and Assignment, pp. 1010, 1011.

(d) As to costs, see sect. 51, and *post*, p. 1037, note (b).

[(e) The Court of Lunacy will not under this section make an order vesting the right to transfer the stock in the persons beneficially entitled to it, as that would in effect be an administration of the trust in Lunacy which the Court always refuses, but on a petition intituled in the Chancery Division as well as in Lunacy the Court will appoint the beneficiaries new trustees of the settlement, and vest the right in them in that capacity; *Re Currie*, 10 Ch. D. 93.]

interest in respect thereof (*f*), and when any person or persons shall be entitled *jointly* with any lunatic or person of unsound mind to any *stock* or *chose en action* upon any trust or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income [\*1015] thereof, \*or to sue for and recover such *chose en action*, or any interest in respect thereof, either in such person or persons, so jointly entitled as aforesaid (*a*), or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint (*b*).

VI. And be it enacted, that when any *stock* shall be standing in the name of any deceased person whose personal representative is a *lunatic* or person of unsound mind, or when any *chose en action* shall be vested in any *lunatic* or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, *intrusted as aforesaid*, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action* or any interest in respect thereof, in any person or persons he may appoint.

VII. And be it enacted, that where any *infant* (*c*) shall be seised or possessed of any *lands* upon any *trust* or by way of *mortgage*, it shall be

(*f*) Where a person of unsound mind was entitled to a sum of stock as trustee, and also entitled to another sum of the same stock beneficially, as the Bank would not *apportion* the *past dividend* between the trust estate and the beneficial estate, the Court in appointing new trustees vested the right to receive the whole dividend in the new trustees upon their undertaking that they would invest in the name of the old trustee so much as belonged to him beneficially; *Re Stewart*, 2 De G. F. & J. 1; [see *Hodges v. Wheeler*, 1 Set. on Dec. 4th edit. 522.]

(*a*) See *Re White*, 5 L. R. Ch. App. 698; [*Re Wachter*, 22 Ch. D. 535, where, one of three executors of the surviving executor of a testator being of unsound mind, an order was made giving the right to transfer stock belonging to the estate of the original testator and still standing in his name. In *Re Nash*, 16 Ch. D. 503, where consols were standing in the names of three trustees one of whom was a lunatic, L. J. Cotton refused to make

an order vesting the right to transfer until a new trustee had been appointed in the place of the lunatic. But the section clearly gives jurisdiction to vest the right in the other trustees without appointing a new trustee, and where there is no object to be attained by such appointment it will be dispensed with; *Re Watson*, 19 Ch. D. 384; and see *Re Ray*, 47 L. T. N. S. 500.]

(*b*) The lunatic husband of a *feme covert* a trustee is within the Act; *Re Wood*, 3 De G. F. & J. 125; and see *Ex parte Bradshaw*, 2 De G. M. & G. 900.

(*c*) A "person of unsound mind" is defined by the 2d section to mean "any person *not an infant*, who, not having been found a lunatic, shall be incapable from infirmity of mind to manage his own affairs." And, therefore, where an infant trustee is of unsound mind the case does not fall under the lunacy jurisdiction of the Chancellor, but the ordinary jurisdiction in Chancery; *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123. And the

lawful for the Court of Chancery (*d*) to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct (*e*); and the order shall have the same effect as if the \*infant trustee or mortgagee, had been twenty-one years [\*1016] of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*a*).

VIII. And be it enacted, that where any infant shall be entitled to any *contingent right* in any *lands* upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed a deed so releasing or disposing of the contingent right.

IX. And be it enacted, that when any person *solely* (*b*) seised or possessed of any lands *upon any trust* (*c*) shall be *out of the jurisdiction* of

infant need not be served with the petition; *Re Tweedy*, 9 W. R. 398; *Re Willan*, Ib. 689.

(*d*) As to the County Courts, see *post*, p. 1045.

(*e*) It is now settled, notwithstanding the doubts entertained at first (see *Re Howard's Estate*, 5 De G. & Sm. 435), that the Court will make an order, vesting an estate on a purchase to the uses commonly called the uses to bar dower; but will not incorporate a declaration that no woman shall be entitled to dower, this being no part of the conveyance; but as uses to bar dower have not that effect as to a woman married since Jan. 1, 1834, a woman so married will be entitled to dower unless otherwise barred; *Re Lush's Estate*, 5 De G. & Sm. 436; *Davey v. Miller*, 17 Jur. 908.

An order has been made to vest the legal estate in the devisees of a mortgagor, subject to a *charge* created by his will; *Re Ellerthorpe*, 18 Jur. 669.

Where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the Court instead of vesting the property in the executor and executrix, when the *feme covert* in order to part with it

would have to acknowledge the deed, vested it in such person or persons as the executor and executrix should appoint, and in default thereof, in the executor and executrix; *Re Powell*, 4 K. & J. 338.

(*a*) Tenant for life with remainder to an infant *in tail*. A vesting order as to the estate of the infant with the consent of the tenant for life, will bar the entail and remainders over; *Powell v. Matthews*, 1 Jur. N. S. 973. See the interpretation clause as to the words "convey," and "conveyance."

(*b*) [It has been held] that a coparcener who has no beneficial interest, but holds in trust for the other coparcener, is solely seised as trustee for such coparcener; *McMurray v. Spicer*, 5 L. R. Eq. 527; [but see *Re Greenwood's Trusts*, 27 Ch. D. 359.]

(*c*) An *heir* who takes the trust estate by the *disclaimer* of the trustees, *Wilks v. Groom*, 6 De G. M. & G. 205, [or by the death of the trustee in the testator's lifetime, *Re Gill*, 1 Set. on Dec. 4th edit. 520,] is a trustee within the section. And an heir of a mortgagee who had taken possession has been held to be a trustee for the mortgagee's executors; *Re Skitter's Mortgage*, 4 W. R. 791;

the Court of Chancery (*d*), or cannot be found (*e*), it shall be lawful for the said Court (*f*) to make an order vesting such *lands* in such [\*1017] person or \*persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

X. And be it enacted, that when any person or persons shall be seised or possessed of any lands *jointly* (*a*) with a person out of the jurisdiction of the Court of Chancery, or who cannot be found, it shall be lawful for the said Court to make an order vesting the *lands* in the person or persons so jointly seised or possessed, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the *trustee* (*b*) out of the jurisdiction, or who cannot be found, had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*c*).

see *post*, 1019, note (*b*); [and see 44 & 45 Vict. c. 41, s. 30.]

A person had contracted to sell an estate, which in equity had converted it into personalty, but before he executed the conveyance died intestate, and it was held that the heir was a trustee for the personal representative; *Re Badcock*, 2 W. R. 386. See *ante*, p. 1011, note (*c*); [and see 44 & 45 Vict. c. 41, s. 4.]

(*d*) A temporary absence, as where the captain of a merchantman was abroad on a voyage, is not within the Act; *Hutchinson v. Stephens*, 5 Sim. 499 (a case under the old Act, 11 G. 4 & 1 W. 4, c. 60). [A trustee may be treated as out of the jurisdiction, although he appears by counsel; *Stillwell v. Ashley*, 1 Set. on Dec. 4th edit. 520.]

(*e*) A defendant against whom an absolute decree of foreclosure upon an equitable mortgage was made, but who could not be found, was deemed to be a trustee for the mortgagee within the Act, and a vesting order was made accordingly; *Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578. See p. 1026, *post*, note (*e*).

[One of three joint mortgagees, who were trustees, refused to concur in a transfer of the mortgage which was executed by the other mortga-

gees; a new trustee was afterwards appointed in his place, and on a petition for a vesting order, it was held that he was a trustee within the meaning of the Act for the transferee of the mortgage; *Re Walker's Mortgage Trusts*, 3 Ch. D. 209.]

[(*f*) This section applies where the trustee out of the jurisdiction is of unsound mind; *Re Gardner's Trusts*, 10 Ch. D. 29.]

[(*a*) The words "seised jointly" are not limited to a legal joint tenancy but are used in a wide sense, and apply to the case of lands descending to the co-heiress and the surviving heir or (if the case fall within sect. 30 of the Conveyancing and Law of Property Act, 1881) the personal representative of a deceased co-heiress of the deceased trustee; *Re Greenwood's Trusts*, 27 Ch. D. 359; *Re Templer's Trusts*, 4 N. R. 494; but see *McMurray v. Spicer*, 5 L. R. Eq. 527.]

(*b*) The word "trustee" does not include a joint mortgagee. One of the mortgagees being out of the jurisdiction, the mortgage money was paid to the joint account of the joint mortgagees, but the Court refused to make an order; *Re Osborn's Mortgage*, 12 L. R. Eq. 392.

(*c*) The concluding words of this section (as a conveyance by one of

XI. And be it enacted, that when any person *solely* entitled to a *contingent right* in any lands upon any *trust* shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

XII. And be it enacted, that when any person *jointly* entitled with any other person or persons to a *contingent right* in any lands upon any *trust* shall be out of the jurisdiction of the Court of Chancery, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction or who cannot be found, to the person or persons so jointly entitled as aforesaid, \*or to such last-mentioned person or persons together [\*1018] with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

XIII. And be it enacted, that where there shall have been two or more persons jointly seised or possessed of any lands upon any *trust*, and it shall be uncertain *which of such trustees was the survivor*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

XIV. And be it enacted, that where any one or more person or persons shall have been seised or possessed of any lands upon any *trust*, and it shall not be known, as to the trustee last known to have been seised or possessed, *whether he be living or dead*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

several trustees would have the effect of severing the joint tenancy) led to a doubt at one time whether the Court had power under this section to vest the lands in the joint owner within the jurisdiction and another as *joint tenants*; *Re Watt's Settlement*, 9 Hare, 106; *Re Pleyers' Trust*, *Ib.* 220. But the doubt has since been dispelled; *Smith v. Smith*, 3 Drew. 72; *Re Marquis of Bute's Will*, Johns. 15.

If one of the *co-heirs* of a mortgagee be out of the jurisdiction, he is a trustee within the 10th section of the Act for the persons entitled to the mortgage money, and the entirety on their petition may be vested in the co-heir within the jurisdiction; *Re Templer's Trusts*, 4 N. R. 494; and see *Re Hughes' Settlement*, 2 H. & M. 695. See p. 1019, note (b).



XV. And be it enacted, that when any person seised of any *lands* upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known *who is his heir or devisee*, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate (*a*).

XVI. And be it enacted, that when any *lands* are subject to a *contingent right* in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any *trust*, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge  
[\*1019] \*such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands.

XVII. and XVIII. — (*These sections were repealed by the Extension Act. See post, p. 1041.*)

XIX. And be it enacted, that when any person to whom any lands have been conveyed by way of *mortgage* shall have died (*a*) *without having entered into the possession* or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands (*b*),

(*a*) This section does not apply to *leaseholds for years*; *Re Mundel's Trust*, 8 W. R. 683; *Re Harvey*, Set. on Dec. 520, 4th edit. But a vesting order as to leaseholds for years may be made on the appointment of new trustees under the 34th section; *Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Rathbone*, 2 Ch. D. 483; *Re Dalgleish's Settlement*, 4 Ch. D. 143, reversing S. C. 1 Ch. D. 46; *Re Mundel's Trust*, 6 Jur. N. S. 880; *Re Matthew's Settlement*, 2 W. R. 85. See, however, *Re Robinson's Will*, 9 Jur. N. S. 885.

[An order vesting the property in a person absolutely entitled can be made under this section; *Re Godfrey's Trusts*, 23 Ch. D. 205.

Now that by 44 & 45 Vict. c. 41, s. 30, trust estates devolve upon the legal personal representatives as if

they were chattels real, it is conceived that this section has ceased to have any application to lands held by a trustee dying after the 31st December, 1881.]

[(*a*) Where the death has occurred since the 31st of December, 1881, it is now unnecessary to have recourse to this section, see 44 & 45 Vict. c. 41, s. 30.]

(*b*) The personal representative of a mortgagee who had *not taken possession*, or the assignee of the representative, may obtain an order vesting the legal estate, which has descended to the heir, notwithstanding the word "re-conveyance" points in strictness to a conveyance to the mortgagor; *Re Boden's Trust*, 1 De G. M. & G. 57; 9 Hare, 820; *Re Quinlan's Trust*, 9 Ir. Ch. Rep. 306; *Re Lea's Trust*, 6 W. R. 482; overruling *Meyrick's*

then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; that is to say:

When an *heir or devisee* (c) of such mortgagee shall be *out of the jurisdiction* of the Court of Chancery or *cannot be found*:

When an *heir or devisee* of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorised agent of such last-mentioned person, have *stated in writing* that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a *proper deed* (d) for conveying such lands shall have been *tendered* to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person:

When it shall be uncertain *which of several devisees* of such mortgagee was the *survivor*:

When it shall be uncertain as to the *survivor* of several devisees of \*such mortgagee, or as to the *heir* of such mort- [\*1020] gagee *whether he be living or dead*:

When such mortgagee shall have died intestate as to such lands, and *without an heir*, or shall have died and it *shall not be known who is his heir or devisee*:

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate.

XX. And be it enacted, that in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance or assignment of any *lands*, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be (a), should it be deemed more convenient, to *make an order appointing a person to convey*

Estate, 9 Hare, 116; and see *Re Hewitt*, 27 L. J. N. S. Ch. 302.

If the mortgagee died intestate, and was *illegitimate*, the Court will make the vesting order on service of the petition on the Crown; *Re Minchin's Estate*, 2 W. R. 179.

If the mortgagee had *taken possession* the *executors* of the mortgagee may obtain an order for vesting in them the legal estate, which has descended to the heir, under the 9th section; *Re Skitter's Trusts*, 4 W. R.

791; or under the 15th section, *Re Keeler*, 11 W. R. 62.

(c) See the interpretation clause, p. 1012, *ante*, as to the meaning of the word "devisee."

(d) As to the instrument to be tendered in the case of *copyholds*, see *Rowley v. Adams*, 14 Beav. 130, where the question arose upon the 17th section, since repealed.

(a) In the case of an *infant trustee* being a "*person of unsound mind*," the case falls, not under lunacy, but

or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed (b), shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act. And in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the Secretary, Deputy Secretary, or Accountant General for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be [\*1021] named in the order (a); and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies, and their officers and servants, for all acts done or permitted to be done pursuant thereto (b).

XXI. And be it enacted, that as to any lands situated within the Duchy of Lancaster or the counties palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the

under the ordinary jurisdiction of the Court; *Re Arrowsmith's Trusts*, 4 Jur. N. S. 1123; see p. 1015, *ante*, note (c).

(b) The conveyance should contain a recital showing that it is made in obedience to the order of the Court, and should be executed by the person appointed to convey in his own name; though the late Vice-Chancellor of England in a case arising upon the 1 W. 4, c. 60, seems to have considered that the execution by the person appointed to convey, of a deed purporting to be the conveyance of the trustee who refused, would, with a mere reference in the attestation clause to the order appointing the person to convey, be sufficient; *Ex parte Foley*, 8 Sim. 395.

(a) The person here meant is not a beneficiary, but where a person has become absolutely entitled, the Court can appoint him a trustee, and direct a transfer to him; *Re Dickson's Settlement*, 27 L. T. N. S. 671; 21 W. R. 220; [and see *Re Currie*, 10 Ch. D. 93.]

(b) The Court under this section can only direct the bank officer to transfer in the place of the person creating the difficulty, and therefore where the stock was standing in the names of two persons, one of whom was out of the jurisdiction, it was necessary to order the person within the jurisdiction to join in the transfer; *Wade v. Hopkinson; Hodgson v. Hodgson*, 1 Set. on Dec. 521, 4th edit.

same cases as to any lands within the jurisdiction of the same Courts respectively as the Court of Chancery has under the provisions hereinbefore contained been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of *Lancaster*, the Court of Chancery in the county palatine of *Lancaster*, or the Court of Chancery in the county palatine of *Durham*, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local Courts to be an absent trustee or mortgagee within the meaning of this Act (c).

XXII. And be it enacted, that when any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery (d), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or chose en action upon any trust (e), it shall be lawful for the said Court (f), to make an order \*vesting the right to transfer such stock, or to receive [\*1022] the dividends or income thereof (a), or to sue for or recover such chose en action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint (b);

(c) This section does not (nor does 17 & 18 Vict. c. 82), enable the provincial Courts to make orders in lunacy; *Re Ormerod*, 3 De G. & J. 249.

(d) Where the trustee out of the jurisdiction is incapacitated from lunacy or infancy, the power of the Court must be sought for in the sections applicable to cases of lunatics and infants, and not in this section. Consequently, in a case arising before the Trustee Extension Act (see 3d section), the Court had no authority to make a vesting order with respect to stock held by an infant trustee out of the jurisdiction; *Cramer v. Cramer*, 5 De G. & Sm. 312.

The order should recite the fact that the trustee is out of the jurisdiction; *Re Mainwaring*, 26 Beav. 172.

As to what will amount to being out of the jurisdiction, see *ante*, p. 1016, note (d).

(e) The husband of an executrix is a trustee within the Act; *Ex parte Bradshaw*, 2 De G. M. & G. 900; and see *Re Wood*, 3 De G. F. & J. 125. [But see now 45 & 46 Vict. c. 75, ss. 1, 2, 5, 18.]

(f) If the Court be asked to transfer the stock to new trustees appointed under a power, it must first be satisfied of the fitness of the persons proposed, and all parties interested must be served; *Re Maynard's Settlement*, 18 Jur. 1084. See p. 1030, note, and p. 1033, note (c).

(a) Of four trustees of stock one was out of the jurisdiction, and M. R., without disturbing the capital, vested the right to receive the dividends in the three trustees. The Bank appealed from this, on the ground that the section did not authorise an unlimited severance of the dividends from the capital, and the L. J.J. confined the order to the dividends to accrue during the lives of the three trustees; *Re Peyton's Settlement*, 2 De G. & J. 290; 25 Beav. 317.

(b) Where the stock is vested in two trustees, one of whom is out of the jurisdiction, the Court has no authority under the first branch of the section to vest the right in the person who asks for it as being the absolute owner; *Re Brass's Trust*, 4 W. R. 764; but see *Ex parte Bradshaw*,

and when any *sole trustee* (c) of any *stock or chose en action* shall be *out of the jurisdiction* of the said Court, or *cannot be found*, or it shall be uncertain *whether he be living or dead*, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest in respect thereof, in any person or persons the said Court may appoint.

XXIII. And be it enacted, that where any *sole trustee* (d) of any *stock or chose en action* shall *neglect or refuse to transfer* such stock, or to *receive the dividends or income* thereof, or to *sue for or recover* such *chose en action* or any interest in respect thereof, according to the direction of the person *absolutely entitled thereto* (e), for the space of twenty-eight days next after a request in writing (f) for that purpose shall have [\*1023] been made \*to him by the person entitled thereto, it shall be lawful for the Court of Chancery to make an order (a) vesting the sole right to transfer such stock, or to receive the dividends or income thereof (b), or to sue for and recover such *chose en action*, or any interest in respect thereof, in such person or persons as the said Court may appoint.

2 De G. M. & G. 900. It does not appear from the report what jurisdiction the Court had to make the order in *Re Ryan's Settlement*, 9 W. R. 137. The stock was standing in the names of two deceased trustees, and the survivor of them had died intestate, and as letters of administration to him involved no inconvenience, but only expense, the case was not within the purview of the Act, except on the appointment of new trustees; see pp. 1028, note (a), and 1031, note (e).

(c) A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but that B. was living. Afterwards B. died. Held that A. was not a sole trustee within the meaning of the 22d section, as he was not *originally* the sole trustee; *Re Randall's Will*, 1 Drew. 401.

(d) Sole trustee may mean the *whole number* of the co-trustees; see interpretation clause, *ante*, p. 1013. *Re Hartnall*, 5 De G. & Sm. 111; [*Re Hyatt's Trusts*, 21 Ch. D. 846.]. See *Re Spawforth's Settlement*, 12 W. R. 978, in which case the order was refused, but it does not appear whether, because the request was not in writ-

ing, or, which is more likely, because the petitioner's title was disputed.

(e) A tenant for life is not a person *absolutely entitled* within the meaning of the Act, except for the purpose of an application limited to the income only; nor is one of two trustees; *Mackenzie v. Mackenzie*, 5 De G. & Sm. 338; more fully reported 16 Jur. 723. But persons duly appointed new trustees are "*absolutely entitled*"; *Ex parte Russell*, 1 Sim. N. S. 404; *Re Baxter's Will*, 2 Sm. & G. App. v.; *Re Ellis's Settlement*, 24 Beav. 426.

(f) The case of a trustee refusing to obey the order of the Court was not within this section; *Mackenzie v. Mackenzie*, 5 De G. & Sm. 338. But see now sect. 4 of the Trustee Extension Act.

(a) As to the person to be served under this and the following section, see *post*, 1033, note (c).

(b) The Court cannot, under this section, make any order as to dividends accrued due subsequently to the date of the request, and *a fortiori* not as to *prospective* dividends; *Re Hartnall*, 5 De G. & Sm. 111. See now sect. 4 of Extension Act.

XXIV. And be it enacted, that where any *one of the trustees* of any stock or chose en action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose en action according to the directions of the person absolutely entitled thereto, for the space of *twenty-eight days* next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose en action, in the other trustee or trustees of the said stock or chose en action, or in any person or persons whom the said Court may appoint *jointly with such other trustee or trustees (c)*.

XXV. And be it enacted, that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found (d), or it shall be uncertain whether such personal representative be living or dead, or such personal representative (e) shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of *twenty-eight days* next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint.

XXVI. And be it enacted, that where any order shall have [\*1024] been made under any of the provisions of this Act vesting the right (a) to any stock in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorised and empowered to execute all deeds and

(c) See *Re White*, 5 L. R. Ch. App. 608.

[(d) Where stock was standing in the names of two original trustees (both deceased), and the survivor of them had died intestate, and there had never been any representation taken to his estate, but new trustees had been appointed under a power, the Court reappointed the new trustees, and made an order vesting the right to call for a transfer of and to transfer the stock in the new trustees; *Re Crowe's Trusts*, 14 Ch. D. 304, 610; and see *Re Hilliard's Settlement Trust*, 42 L. T. N. S. 79.]

(e) This enactment applies where the executor of a surviving trustee has not proved, and declines to say

whether he intends doing so, and has neglected to transfer; *Re Ellis's Settlement*, 24 Beav. 426; [and where the executor of the executor of the last surviving trustee refuses to prove; *Re Price's Settlement*, W. N. 1883, p. 202]; and see under 1 W. 4, c. 60; *Cockell v. Pugh*, 6 Beav. 293; *Re Lunn's Charity*, 15 Sim. 464; and the Court seems to have made a similar order when the next of kin who was entitled to take out administration had refused to make the transfer; *Re Stroud's Trusts*, W. N. 1874, p. 180.

(a) See Sect. 6 of the Trustee Extension Act, and p. 1043, note (b), *post*.

powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise (b), or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of *England*, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of *England*, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the persons in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of *England*, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

XXVII. And be it enacted, that where any order shall have been made under the provisions of this Act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any *chose en action* or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such *chose en action*, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such *chose en action*.

XXVIII. And be it enacted, that whensoever under any of the provisions of this Act, an order shall be made, either by the Lord Chancellor, [\*1025] intrusted as aforesaid, or the Court of Chancery, vesting any *copyhold* or customary lands in any person or persons, and such order shall be made with the *consent* (a) of the lord or lady of the

[(b) See *Re Peacock*, 14 Ch. D. 212; where the order was made so as to vest in the new trustees the right to call for a transfer of the funds to themselves or to any purchaser or purchasers.]

(a) The Court has power *without the consent of the lord* to vest in the person nominated by the Court all

such estate as was vested in the person in respect of whom the inconvenience to be remedied by the Court arises. Such an order does not affect the interests of the lord, and therefore the petition need not be served upon him. On the order being made, the person in whom the property is vested applies for admission as an

manor whereof such lands are holden, then the lands shall, *without any surrender or admittance* in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, *appointing any person or persons to convey or assign any copyhold or customary lands*, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands (b); and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of a manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

XXIX. And be it enacted, that when a decree shall have been made by any Court of equity directing the *sale* of any lands for the payment of the *debts* (c) of a deceased person, every person *seised or possessed* of such lands, or entitled to a *contingent right* therein as heir, or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this Act; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will [\*1026] of such deceased debtor, of any unborn person (a).

ordinary surrenderee would have done. So instead of a *vesting* order, the Court, without the consent of the lord, may appoint a person to *convey* the copyholds, and then the person so appointed must surrender, and the surrenderee must be admitted. But to prevent circuitry, this section *allows* the lord to consent to a vesting order, and then the estate will vest without the necessity of any surrender or admission; *Paterson v. Paterson*, 2 L. R. Eq. 31; S. C. 35 Beav. 506; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, 1 Set. on Dec. 540, 4th edit.; *Re Hey's Will*, 9 Hare, 221, overruling *Cooper v. Jones*, 2 Jur. N. S. 59; *Re Howard*, 3 W. R. 605.

When on the death of a trustee the customary heir was out of the jurisdiction and the Court appointed a new trustee, the lord claimed two fines, one for the admission of the customary heir and another for the

admission of the new trustee, but it was ruled that he could claim one fine only, viz., on the admission of the new trustee; *Bristow v. Booth*, 5 L. R. C. P. 80.

Where the lord consents, it may be by act *in pais*, without appearance in Court; *Ayles v. Cox*, 17 Beav. 585.

(b) See 20th section, and see form of order appointing a person to complete the assurance of a copyhold estate; *Re Hey's will*, 9 Hare, 221.

(c) A sale for payment of *costs* of suit was not within this Act; *Weston v. Filer*, 5 De G. & Sm. 608. But see now sect. 1 of the Trustee Extension Act, and *Wake v. Wake*, 17 Jur. 545.

(a) See such an order without a petition in *Wood v. Beestestone*, 1 K. & J. 213. But see *Gough v. Bage*, 25 L. T. N. S. 738.



XXX. And be it enacted, that where any decree (*b*) shall be made by any Court of equity for the *specific performance* of a contract concerning any lands (*c*), or for the *partition* (*d*) or *exchange* of any lands, or generally when any decree shall be made for the *conveyance* or *assignment* of any lands (*e*), either in cases arising out of the doctrine of election [\*1027] or \*otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit wherein such decree is made are

(*b*) See Trustee Extension Act, s. 1, which applies not only to a decree but to any order of the Court.

(*c*) See such an order under this Act and the Trustee Extension Act, in *Ex parte Mornington*, 4 De G. M. & G. 537. [In suits for the specific performance of a contract for a lease the Court has on several occasions made orders under this section appointing a person to convey, or vesting the interests of unborn persons; see *Hodgson v. Bower*, *Howell v. Palmer*, 1 Set. on Dec. 4th edit. pp. 529, 530; *Hall v. Hale*, 61 L. T. N. S. 226; but in *Grace v. Baynton*, 25 W. R. 506, the late M. R. expressed his opinion that in such a case the Court had no power either to appoint a person to convey in the place of a party refusing to execute the lease, or to make a vesting order.]

(*d*) In a partition suit, instead of giving an infant entitled to a share a day to show cause, the Court may declare him to be a trustee of such parts of the property as are allotted to other parties; *Bowra v. Wright*, 4 De G. & Sm. 265.

Where a lunatic was interested in an undivided share, and a partition was decreed with a declaration that the lunatic was a trustee within the Act, the L. J. authorised the committee of the estate to convey by an order made under the Trustee Act, and under 16 & 17 Vict. c. 70; *Re Bloomar*, 2 De G. & J. 88. But it has since been held that the L. J. have jurisdiction to make a vesting order under the Trustee Act; *Re Molyneux*, 4 De G. F. & J. 365.

(*e*) In a foreclosure suit by an equitable mortgagee, the Court in

making an absolute decree for foreclosure and directing a conveyance, can add a declaration that the mortgagor is a trustee for the mortgagee, and make a vesting order; *Lechmere v. Clamp* (No. 2), 30 Beav. 218; *S. C.* (No. 3), 31 Beav. 578; [and in a recent case of an equitable mortgage, where the mortgagor had died having devised his estate to trustees upon trust for sale, and the trustees having disclaimed, the legal estate descended to the heir of the mortgagor, who was an infant and was made a defendant to a foreclosure action, the Court, in making the usual foreclosure decree, inserted a declaration that "in case the plaintiffs were not redeemed within six months, the infant should be a trustee for them within the Act, and that his mother, who was executrix of the mortgagor, should be ordered to convey on his behalf"; *Foster v. Parker*, 8 Ch. D. 147; but where the mortgagor who had created an equitable mortgage by deposit died intestate, and the estate descended to the infant heir subject to the mortgage, the judgment directed the infant to convey when he attained twenty-one, and gave him a day to show cause; *Mellor v. Porter*, 25 Ch. D. 158. "This section applies to all cases where there is a judgment against an infant for an immediate conveyance, but this is not the form of a judgment for foreclosure in the case of an equitable mortgagee," per Kay, J. *Mellor v. Porter*, *ubi sup.*] In another case the Court required a separate application to be made; *Smith v. Boucher*, 1 Sim. & G. 72.

In *Weston v. Filer*, 5 De G. & Sm.

trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of *unborn persons* (a) who might claim under any *party to the said suit*, or under the *will or voluntary settlement* of any person deceased who was during his lifetime a *party to the contract or transactions* concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights and interests of trustees born or unborn.

XXXI. And be it enacted, that it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make *declarations and give directions concerning the manner* in which the *right to any stock or chose en action* vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced (b).

XXXII. And be it enacted, that whenever it shall be *expedient* (c)

608, where an estate had been ordered to be sold for payment of costs, there was no decree for a conveyance, so that the case was not within the section; and V. C. Parker considered that it could not be deemed a case of constructive trust, but as to which see *Jackson v. Milfield*, 5 Hare 538, and the other cases on sect. 18 of the 1 W. 4, c. 60, note (e), p. 839, of 3d edit. of this work.

In cases falling within the 30th section, the vesting order may now be obtained at chambers; [Rules of the Supreme Court, Order 55, R. 2 (8).]

(a) The expression "unborn persons" has been construed liberally, and has been held to include the "heirs of a person now living; *Bassett v. Moxom*, 20 L. R. Eq. 182.

(b) Under this section the Court has no jurisdiction to order the fund into Court; *Re Parby*, 29 L. T. 72. But it can direct trustees to transfer into court under the Trustee Relief Act; *Re Thornton's Trusts*, 9 W. R. 475.

(c) Where a trustee appointed by a will is an *infant*, the Court deems it expedient to appoint a trustee in his place; *Re Porter's Trust*, 2 Jur. N. S. 349; *Re Gartside's Estate*, 1 W. R. 196. But the order should be without prejudice to an application by the infant on his coming of age to be restored to the trust; *Re Shelmerdine*, 33 L. J. N. S. Ch. 474; [*Re Brunt*, W. N. 1883, p. 220.

Where a trustee is by age and infirmity incapable of acting as a trustee the Court considers it expedient to appoint a new trustee in his place; *Re Lemann's Trusts*, 22 Ch. D. 633.]

Where there is a great difficulty in obtaining administration to the deceased trustee, or last surviving trustee, the Court considers it expedient to appoint new trustees; *Davis v. Chanter*, 4 Jur. N. S. 272; *Re Matthews*, 26 Beav. 463; or generally where there is no personal representative of a surviving trustee; *Re Davis's Trust*, 12 L. R. Eq. 214.

Where two trustees were desirous

[\*1028] to \*appoint (a) a *new trustee or new trustees*, and it shall be found *inexpedient, difficult (b) or impracticable* so to do without the assistance of the Court of Chancery, it shall be lawful for the said

of retiring, and it was *doubtful* whether the power of appointing new trustees in the settlement applied to the case, it was deemed *expedient* to appoint new trustees; *Re Woodgate's Settlement*, 5 W. R. 448; *Re Armstrong's Settlement*, *Ib.*

A trustee had become bankrupt, had never surrendered and absconded, and the Court under the Trustee Act, 1850, and the Bankruptcy Act, 1849, s. 130, appointed a new trustee in his place; *Re Renshaw's Trusts*, 4 L. R. Ch. App. 783.

The three trustees appointed by a testator died in his lifetime, and the Court appointed new trustees; *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251.

Under the combined effect of this section, and of the Bankruptcy Act, [1883, s. 147, which in substance re-enacted the 117th section of the Bankruptcy Act, 1869] the court has power to appoint a new trustee in the place of a trustee who has become bankrupt, whether he voluntarily resigns or not; *Coombes v. Brookes*, 12 L. R. Eq. 61.

(a) The Court cannot under the Act remove a trustee who is willing to act; *Re Hodson's Settlement*, 9 Hare, 118; *Re Hadley*, 5 De G. & Sm. 67; *Re Garty's Settlement*, 3 N. R. 636; [*Re Combs*, 51 L. T. N. S. 45.] Thus where one of the two trustees was residing out of the jurisdiction, but it did not appear whether such residence was likely to be permanent, the Court refused to appoint a new trustee in his room; *Re Mais*, 19 Jur. 608; see *Re Lincoln Primitive Methodists*, 1 Jur. N. S. 1011. [Where it was alleged that a trustee was of unsound mind, but the trustee disputed his insanity and was unwilling to be removed, the Court refused to make an order; *Re Combs*, 51 L. T. N. S. 45.] If there be ground for remov-

ing a trustee for misconduct or other cause, the application to the Court should be by suit, as it was not the intention of the Act to deprive retiring trustees of their right to have their accounts taken in the presence of their *cestuis que trust*, or of their *lien* upon the trust estate, for any balance due to them; *Re Blanchard*, 7 Jur. N. S. 505. Even a *solicitor*, though an officer of the Court, is not removable by petition against his will, on grounds of misconduct in the character, not of solicitor, but of trustee; *Re Blanchard*, 3 De G. F. & J. 131. But where one of the trustees had gone to Australia, and it was not known where he was, the Court appointed a new trustee in his place; *Re Harrison's Trusts*, 22 L. J. N. S. Ch. 69. And where an assignee in bankruptcy had resigned his office and gone abroad, and the creditors had accepted his resignation, the Court made a vesting order; *Re Joyce's Estate*, 2 L. R. Eq. 576; and in another case where a trustee had gone abroad to reside permanently the Court appointed a trustee in his place; *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223. [Under the Bankruptcy Act, 1883, s. 147, as was the case under the Bankruptcy Act, 1869, s. 117, a bankrupt trustee may be removed against his will, both these sections containing the words "whether voluntarily resigning or not"; *Re Adams's Trusts*, 12 Ch. D. 634.]

(b) Where there is a *power of appointment* of new trustees, and the donee is willing to exercise it, the Court will not appoint new trustees upon a suggestion that the power will be improperly exercised; *Re Hodson's Settlement*, 9 Hare, 118. But where the parties having the power of appointing new trustees were resident

Court of Chancery to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees (c).

in India, the Court made an order; *Re Humphry's Estate*, 1 Jur. N. S. 921. If the power of appointing new trustees be vested in a lunatic, the Court of Chancery has jurisdiction to appoint a new trustee not under the special power given to the lunatic, but under the statutory power of the Act; *Re Sparrow*, 5 L. R. Ch. App. 662. The petition should state, if such is the case, that there is a power of appointing new trustees, but that the persons capable of exercising it are not willing to do so; *Re Sutton*, 28 Ch. D. 464.

If trustees have been already appointed under a power, the Court can appoint them again for the purpose of making a vesting order; *Re Mundel's Trust*, 2 L. T. N. S. 653; [*Re Pearson*, 5 Ch. D. 982; *Re Chell*, 49 L. T. N. S. 196;] *Re Carson's Settlement Trusts*, W. N. 1867, p. 32; *Re Clay's Settlement*, W. N. 1873, p. 129; *Re Dalgleish's Settlement*, 4 Ch. D. 143, reversing S. C. 1 Ch. D. 46; [*Re McCarthy's Trusts*, 1 L. R. Ir. 16;] and see *Re Driver's Settlement*, 19 L. R. Eq. 352. But the Court will require evidence of the fitness of the persons appointed before making such order; *Re Maynard's Settlement*, 16 Jur. 1084.

(c) Where it is sought to substitute a trustee in the place of a lunatic trustee, the application must be made in lunacy; *Re Ormerod*, 3 De G. & J. 249, and cases there cited; *Re Davidson*, 20 L. J. N. S. Ch. 644; *Re Waugh's Trust*, 2 De G. M. & G. 279; *Re Good Intent Benefit Society*, 2 W. R. 671; *Jeffries v. Drysdale*, 9 W. R. 428; see *Trustee Extension Act*, s. 10, and *Re Burton's Trusts*, 6 I. R. Eq. 270.

On an application for the appointment of new trustees and a vesting order where the legal estate is vested

in three persons, one of whom is a lunatic, the petition should be presented in Lunacy as well as in Chancery; *Re Mason*, 10 L. R. Ch. App. 273; [*Re Duce's or Druce's Trusts*, 30 W. R. 759; 46 L. T. N. S. 669; but where the application is merely for the appointment of new trustees and no vesting order is required, the order may be made in Chancery only; *Re Vickers's Trusts*, 3 Ch. D. 112. Where there were originally three trustees, and a new trustee had been appointed under a power, in the place of one of the trustees who was a lunatic, it was held that a petition for a vesting order must be entitled in Chancery as well as in Lunacy, as otherwise the vesting order would sever the joint tenancy, and that the new trustee must be reappointed by the Court before a vesting order could be made; *Re Pearson*, 5 Ch. D. 982; *Re Chell*, 49 L. T. N. S. 196. Where the existing trustee was of unsound mind and out of the jurisdiction, new trustees were appointed in Chancery and a vesting order made under sect. 9; *Re Gardner's Trusts*, 10 Ch. D. 29.]

If the power of appointing new trustees be in the tenant for life who is a lunatic, the Court will not appoint a new trustee under the Act until the appointment of a committee; *Re Parker's Trusts*, 32 Beav. 580.

In an application to the Court for the appointment of new trustees of a settlement, it was objected that the deed was invalid, but the Court refused to enter into that question, and appointed new trustees to protect the property; *Re Matthews*, 26 Beav. 463.

The decisions were formerly in conflict, whether under this section the Court could appoint new trustees in a case where there was no existing trustee, Vice-Chancellor Parker holding the affirmative; *Re Tyler's Trust*,

[\*1029] \*XXXIII. And be it enacted, that the person or persons who, upon the making of such order as last aforesaid, shall be trustee

5 De G. & Sm. 56; and Vice-Chancellor Turner the negative; *Re Hazeldine*, 16 Jur. 853. And see *Re Frost's Settlement*, 15 Jur. 644. But all doubt for the future has been removed by the 9th section of the Trustee Extension Act.

The Court in appointing new trustees under this section does not limit itself necessarily to the number named in the original instrument of trust. Thus it has appointed two instead of one; *Tunstall's Will*, 4 De G. & Sm. 421; and has added two new trustees to the two original trustees; *Re Baycott*, 5 W. R. 15. But it never appoints a *single* trustee where there were originally more trustees than one; *Re Ellison's Trust*, 2 Jur. N. S. 62; *Re Porter's Trust*, 2 Jur. N. S. 349; *Re Tunstall*, 15 Jur. 645; *Re Dickinson's Trust*, 1 Jur. N. S. 724. But where there was only one trustee originally and the trust was coming to an end the Court appointed a single trustee; *Re Reynault*, 16 Jur. 233. The Court will appoint two trustees where there were originally three; *Bulkeley v. Earl of Eglinton*, 1 Jur. N. S. 994; *Re Marriott's Settlement*, 18 L. T. N. S. 749; or will appoint three where there were originally four; *Emmet v. Clarke*, 7 Jur. N. S. 404; and where a fund was bequeathed to a single trustee upon trust for a person for life, with remainder to two others, and the remaindermen petitioned for the appointment of an additional trustee, the Court made the order but threw the costs upon the remaindermen; *Re Brackenbury's Trusts*, 10 L. R. Eq. 45.

In one case, where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court appointed the two continuing trustees

to be the sole trustees; *Re Stokes's Trusts*, 13 L. R. Eq. 333; [and this decision was subsequently followed in *Re Tatham's Trusts*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Gibbin's Trusts*, W. N. 1880, p. 99; *Re Shipperdson's Trusts*, 49 L. J. N. S. Ch. 619; *Re Northorp*, 29 W. R. 134; but in *Re Colyer*, 50 L. J. N. S. Ch. 479, L. J. Cotton, in a Lunacy petition, declined to follow it, and required the full number of trustees to be made up; and in *Re Aston*, 23 Ch. D. 217, the late M. R., with the concurrence of the other members of the Court, while adhering to his decision in *Re Harford's Trusts*, declined to follow it, on the ground of L. J. Cotton's objection, and to avoid a conflict of decisions between the practice of different members of the Court; and see *Re Lamb's Trusts*, 28 Ch. D. 77. But where the whole of the fund is immediately divisible, the Court will not require the appointment of a new trustee; *Re Martin*, 26 Ch. D. 745; *Re Lamb's Trust*, *ubi supra*.]

In the case of a *charity*, the Court appointed ten new trustees and vested the estate in the whole body, and directed that when reduced to three the trustees should apply at Chambers for the appointment of new trustees; *Re Bergholt*, 2 Eq. Rep. 90.

The Court will not [in general] appoint persons trustees who are resident *out of the jurisdiction*; *Re Guibert*, 16 Jur. 852; *Re Curtis's Trust*, 5 I. R. Eq. 420; [but the Court has in several cases, where the special circumstances rendered that course advisable, appointed such trustees; *Re Austen's Settlement*, 38 L. T. N. S. 601; *Re Cunard's Trusts*, 48 L. J. N. S. Ch. 192; 27 W. R. 52; *Re Hill's Trusts*, W. N. 1874, p. 228;] and it will not appoint one of the *cestuis que trust* a trustee, if it can be avoided; *Ex parte Clutton*, 17 Jur. 988; *Re*

or trustees. \*shall have all the same rights and powers as he [\*1030] or they would have had if appointed by decree in a suit duly instituted.

Clissold, 10 L. T. N. S. 642; *Ex parte* Conybeare's Settlement, 1 W. R. 458; and see *Re Giraud*, 32 Beav. 385.

The husband of a *cestui que trust* was appointed jointly with another, on the husband's undertaking that if he became sole trustee he would immediately take steps for the appointment of a co-trustee; *Re Hattatt's Trusts*, 21 L. T. N. S. 781; 18 W. R. 416; [*Re Burgess's Trusts*, W. N. 1877, p. 87; *Re Lightbody's Trusts*, 52 L. T. N. S. 40; but this undertaking was not required in *Re Jesson* (In Lunacy, 7 Aug. 1878, M.S.), where three new trustees were appointed, one of whom was the husband of the tenant for life.] In another case one of the firm of solicitors who acted for the petitioners was appointed trustee; *Re Brentnall's Trusts*, W. N. 1872, p. 77.

A *cestui que trust* may apply for the appointment of new trustees by *petition* under the Act, but this does not preclude him from instituting a suit for that purpose; *Legg v. Mackrell*, 1 Giff. 165; 4 L. T. N. S. 568. But if he adopt the latter course instead of presenting a petition the Court may make the offending party answerable for the difference of the costs; *Thomas v. Walker*, 18 Beav. 521.

Where there are *two distinct trust estates* under the same will, but only one set of trustees, the Court, with the consent of the representative of the surviving trustee, will appoint new trustees of one estate without dealing with the other estate; *Re Dennis*, 12 W. R. 575; and generally the Court assumes the power of appointing separate trustees of separate shares; *Re Cotterill's Trusts*, W. N. 1869, p. 183; [and see sect. 5 of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, which now expressly authorises this to be done.]

The Court can appoint new trustees under this section where a trust is an *office* without any estate; *Re Boyce*, 10 Jur. N. S. 138; but in such a case where the trustee was a lunatic, the order should have been made both in Chancery and Lunacy; S. C. see *ante*, p. 1013, note (e). But now by the 10th section of the Extension Act the order can be made in lunacy only; *Re Owen*, 4 L. R. Ch. App. 782. The Court (notwithstanding the 197th section of the Bankruptcy Act, 24 & 25 Vict. c. 134) appointed new trustees of a creditors' deed; *Re Price's Trust Deed*, 6 L. R. Eq. 460; *Re Bache's Trust*, 16 W. R. 1078; *Re Raphael's Trust Estate*, 9 L. R. Eq. 233; *Re Donisthorpe*, 10 L. R. Ch. App. 55.

In addition to the evidence of the necessary facts to bring the case within the Act, the Court before appointing new trustees requires evidence by affidavit of the *fitness* of the proposed trustees, and *their consent* to act; *Re Battersby's Trust*, 16 Jur. 900. But if the evidence be satisfactory the Court will make the order at once, without a *reference*; *Re Tunstall*, 15 Jur. 645. [In ordinary cases an affidavit of fitness by one responsible person is sufficient, but if the trust fund be of large amount, the evidence of a second person may be required; *Re Hartley's Will*, W. N. 1870, p. 197.]

The new trustee *need not* appear upon the petition to consent; *Re Draper's Settlement*, 2 W. R. 440; though they *may* appear to consent; *Re Parke's Trust*, 21 L. T. 218. If they do not appear an *affidavit* that the proposed new trustees will consent is insufficient; *Re Parke's Trust*, 21 L. T. 218; and their *written consent* must be proved.

Where the trust fund is the subject of a *suit*, the affidavit of the *solicitor*

[\*1031] \*XXXIV. And be it enacted, that it shall be lawful (a) for the said Court of Chancery upon making any order (b) for appointing a new trustee or new trustees, either by the same or by any subsequent order (c) to direct that any *lands* subject to the trust (d) shall *vest* in the person or persons who upon the appointment shall be the trustee or trustees, for such estate as the Court shall direct; and such order shall have the same effect as if the person or persons who before such order [was or] were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (e).

*in the cause* is not the proper evidence of the fitness of the new trustee, as it is the trustees' duty to watch the solicitor; *Grundy v. Buckeridge*, 22 L. J. N. S. Ch. 1007.

In one order the Court inadvertently appointed an *alien* a trustee and afterwards refused to substitute a natural born subject without the consent of the Crown, which was not given. The order was then reheard by the same judge *pro formâ* and discharged, and a natural born subject appointed in the place of the alien; *Re Giraud*, 32 Beav. 385. See now 33 Vict. c. 14, s. 2, and where the *cestuis que trust* were living abroad and English trustees could not be found, the Court appointed aliens; *Re Hill's Trusts*, W. N. 1874, p. 228; [and see *ante*, p. 1030.]

As to the parties to be served on applications for the appointment of new trustees, see note (c), page 1033, *infra*.

(a) The late Vice-Chancellor Parker was not disposed to make a *vesting* order in cases where a *conveyance* could be had; *Langhorn v. Langhorn*, 21 L. J. N. S. Ch. 860. But it is clear that the Court has power to make, and according to the present practice, it frequently does make, vesting orders even where there is no incapacity in the person seised or possessed of the legal estate to convey to the new trustee; *Re Manning's Trusts*, Kay, App. xxviii.

(b) If the necessary evidence was not forthcoming at the date of the order, but it is afterwards obtained, the order must under the direction of

the Court, be made over again, so as to bear date subsequently to the production of the evidence; *Re Have-lock's Trusts*, 11 Jur. N. S. 906.

(c) The new trustees may be appointed in a suit, and a *vesting order* may be made *subsequently*. See *Re Hughes's Settlement*, 2 H. & M. 695.

(d) If the lands be *leaseholds* for a term of years, the Court can, under this section, make a vesting order, and without the concurrence of the landlord unless there was a restriction against alienation; *Re Matthew's Settlement*, 2 W. R. 85, &c.; [*Re Driver's Settlement*, 19 L. R. Eq. 352; *Re Dalgleish's Settlement*, 4 Ch. D. 143, reversing S. C. 1 Ch. D. 46; *Re Rathbone*, 2 Ch. D. 483;] see *ante*, p. 1018, note (a). But see *Re Farrant's Trust*, 20 L. J. Ch. 532. And the Court has jurisdiction to vest the estate though it has escheated to the Crown, provided the Crown consent; *Re Martinez's Trust*, W. N. 1870, p. 70; 22 L. T. N. S. 403; and see sect. 15, of this Act.

(e) The Court has jurisdiction to divest the *whole estate* from the continuing and incapacitated trustees, and to vest it in the new body of trustees (including the continuing trustees) as joint tenants; *Re Fisher's Will*, 1 W. R. 505; *Smith v. Smith*, 3 Drew. 72, overruling *Re Watts's Settlement*, 9 Hare, 106, and *Re Plyer's Trust*, Ib. 220. But the Court has no power to give any direction as to the mode in which the trust shall be executed by the trustees; *Re Tayler*, 2 De G. F. & J. 125; see *ante*, p. 1027; note (b).

\*XXXV. And be it enacted, that it shall be lawful for the [\*1032] said Court of Chancery, upon making an order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to *vest* the right to call for a transfer of any *stock* (a) subject to the trust, or to receive the *dividends* or income thereof, or to sue for or recover any *chose en action*, subject to the trust, or any *interest* in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (b).

XXXVI. And be it enacted, that any such appointment by the Court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

XXXVII. And be it enacted, that an order under any of the hereinbefore contained provisions for the appointment of a *new trustee or trustees*, or concerning any *lands, stock, or chose en action* subject to a trust, may be made upon the application of any *person beneficially interested* in such lands, stock, or *chose en action*, whether under disability or not (c), or upon the application of any person *duly appointed as a*

(a) The Court has no power under this section to vest the *right to the stock* itself, but only the right to *call for a transfer*; and an order professing to vest the right to the stock was accordingly discharged; *Re Smyth's Settlement*, 4 De G. & Sm. 499; but see now sect. 6 of the Trustee Extension Act, and p. 1043, *post*, note (b).

The Court has power under this section to vest the right as to stock standing in the name of a deceased person who has no personal representative; *Re Herbert's Will*, 8 W. R. 272. [See *Re Crowe's Trusts*, 14 Ch. D. 304, 610.]

The Court will not make a vesting order which would lend any sanction to a past breach of trust; *Re Harrison*, 22 L. J. N. S. Ch. 69. And the Court as distinct from the L. C. & L. J. J. will not make a vesting order where the old trustee in whom the property is vested is a lunatic; *Re Smith's Trusts*, 4 I. R. Eq. 180.

[Where part of the trust funds had been invested in unauthorised securities, and it was desired to sell them and reinvest the proceeds in

proper securities, the Court vested in the new trustees the right to call for a transfer of the funds to themselves, or to any *purchaser or purchasers*, the trustees undertaking to hold the proceeds on the trusts of the settlement; *Re Peacock*, 14 Ch. D. 212.]

(b) A vesting order vests the estate from the date of the order; *Woodfall v. Arbuthnot*, 3 L. R. P. & D. 108.

(c) A person *contingently* entitled to a beneficial interest is within the meaning of the Act; *Re Sheppard's Trusts*, 8 Jur. N. S. 711, reversed 1 N. R. 76; 4 De G. F. & J. 423.

In sales by the Court the *purchaser*, as beneficially interested in the property sold, is within the meaning of the section; *Ayles v. Cox*, 17 Beav. 584; *Rowley v. Adams*, 14 Beav. 130. And the plaintiffs in the suit, as beneficially interested in the proceeds, are also within the meaning of the section; *Re Wragg*, 1 De G. J. & S. 356. And of course the purchaser or several purchasers and the plaintiffs can join as co-petitioners; *Rowley v. Adams*, 17 Beav. 130, see 135.



[\*1033] *\*trustee thereof*; and that an order under any of the provisions hereinbefore contained concerning any *lands, stock, or chose en action* subject to a *mortgage*, may be made on the application of any person *beneficially interested in the equity of redemption*, whether under disability or not, or of any *person interested in the monies secured by such mortgage*.

XXXVIII. and XXXIX. (*These sections were repealed by "The Statute Law Revision Act, 1875."*)

XL. And be it enacted, that any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor intrusted as aforesaid, may, should he so think fit, *present a petition (a)* in the first instance to the Court of Chancery, or to the Lord Chancellor intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by *affidavit or otherwise (b)* in support of such petition before the said Court, or the Lord Chancellor intrusted as aforesaid, and may *serve such person or persons* with notice of such petition *as he may deem entitled to the service thereof (c)*.

*Committees of a lunatic cestui que trust* are not beneficially interested within the meaning of the section; *Re Bourke*, 2 De G. J. & S. 426.

(a) When a petition has been presented, it may be *amended* by order of the Court by adding copetitioners without being re-answered; *Re Cartwright's Trust*, 8 W. R. 492.

(b) In practice the evidence adduced is universally by affidavit, but under the words "or otherwise" the applicant is not confined to evidence by affidavit.

(c) In petitions for the appointment of new trustees, all the *cestuis que trust* ought, as a general rule, to be served; *Re Richards' Trust*, 5 De G. & Sm. 636; *Re Sloper*, 18 Beav. 596; *Re Fellows's Settlement*, 2 Jur. N. S. 62; *Re Maynard's Settlement*, 16 Jur. 1084; and see *Re Lonsdale's Trust*, 14 Jur. 1101; *Re Thomas's Trust*, 15 Jur. 187; *Re Prescott's Trust*, 19 L. T. 371. But in special cases the Court relaxes the rule; *Re Smyth's Settlement*, 2 De G. & Sm. 781; *Re Blanchard*, 3 De G. F. & J. 137; *Re Blanchard's Estate*, 2 N. R. 386; [*Re Lightbody's Trusts*, 52 L. T. N. S. 40.] The devolution of the beneficial title may be traced by affidavit, without strict evidence by

certificates and affidavits of identity; *Re Hoskins*, 4 De G. & J. 436.

Where it is proposed to appoint new trustees in *substitution* for existing trustees the petition must be served on the old trustees, *Re Sloper*, 18 Beav. 596; who will have their costs; *Futvoye v. Kennard*, 3 L. T. N. S. 687. [But where a trustee is permanently resident abroad, *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223; *Re Martin Pye's Trusts*, 42 L. T. N. S. 247; or where a trustee has absconded and cannot be found, *Re Nicholson's Trusts*, W. N. 1884, p. 76; *Hyde v. Benbow*, W. N. 1884, p. 117; service is unnecessary.]

Where an order is asked against *recusant* trustees under the 23d or 24th section, the trustees need not be served; *Re Baxter's Will*, 2 Sim. & G. App. v.; and see the following cases, decided under 1 Will. 4, c. 60, s. 8; *Re Third Burnt Tree Building Society*, 16 Sim. 296; *Re Bradburne*, 12 L. J. N. S. Ch. 353.

In orders against a *lunatic* trustee, the committee of the estate must be served, as the lunatic trustee may have some claim for costs or otherwise; *Re Saumarez*, 8 De G. M. & G. 390; and see *Re Wood*, 7 Jur. N. S. 323. But in other cases service on

\*XLI. And be it enacted, that upon the hearing of any such [\*1034] (*motion or*) (a) petition it shall be lawful for the said Court, or for the said Lord Chancellor, should it be deemed necessary, to *direct a reference* to one of the Masters in Ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said Court or the said Lord Chancellor to direct such (*motion or*) (a) petition to *stand over*, to enable the petitioner or petitioners to adduce evidence or further evidence before the said Court, or before the said Lord Chancellor, or to enable notice or any further notice of such (*motion or*) petition to be served upon any person or persons.

XLII. And be it enacted, that upon the hearing of any such (*motion or*) (b) petition, whether any (*certificate or*) report from a Master shall have been obtained or not, it shall be lawful for the Court, or the Lord Chancellor, intrusted as aforesaid, to *dismiss such* (*motion or*) *petition, with or without costs*, or to *make an order* thereupon in conformity with the provisions of this Act.

XLIII. And be it enacted, that whensoever in any *cause or matter*, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the *hearing of the said cause*, or of *any petition or motion* in the said cause or matter, to make such order under this Act (c).

the lunatic or his committee was deemed unnecessary; *Re East*, 8 L. R. Ch. App. 735; *Re Green*, 10 L. R. Ch. App. 272. The guardian of the infant heir of a trustee need not be served with a petition for a vesting order upon the appointment of new trustees; *Re Little*, 7 L. R. Eq. 323. But the adult heir of the last surviving trustee must be served, for he may have some claim to costs; *Re Oxenham's Trusts*, W. N. 1875, p. 6. [But see 44 & 45 Vict. c. 41, s. 30.]

Where an estate is subject to an *annuity*, a vesting order may be made without service on the annuitant; *Re Winteringham's Trust*, 3 W. R. 578.

As to service on the lord of a manor, in respect of *copyholds*, see *ante*, p. 1025, note (a).

As to service on the *remainderman*, where the trust estate is a term of years, see *ante*, p. 1031, note (d).

[The Court has jurisdiction to order service of the petition upon

a person out of the jurisdiction; *Re Wycherley's Trusts*, 1 L. R. Ir. 12.]

[(a) The words "motion or" in this section are repealed by "The Statute Law Revision Act, 1875."]

[(b) The words "motion or" and "certificate or" in this section are repealed by "The Statute Law Revision Act, 1875."]

(c) An order may be made in a *suit* without a *petition*; *Wood v. Beetlestone*, 1 K. & J. 213; *Collard v. Roe*, 4 Jur. N. S. 431; 4 De G. & J. 525; *Lechmere v. Clamp*, 9 W. R. 860; *Hargreaves v. Wright*, 1 W. R. 408; *Hughes v. Wells*, 2 W. R. 575; but see *Gough v. Bage*, 25 L. T. N. S. 738. The High Court has no such jurisdiction to make a vesting order respecting property which is vested in a *lunatic*, but there must be a petition in lunacy; *Jeffries v. Drysdale*, 9 W. R. 428. [In *Frodsham v. Frodsham*, 15 Ch. D. 317, it was held by the Court of Appeal, reversing the late M. R., that, having regard to the

[\*1035] \*XLIV. And be it enacted, that whenever any order shall be made under this Act, either by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, for the purpose of *conveying or assigning any lands*, or for the purpose of releasing or disposing of any *contingent right*, and such order shall be founded on an allegation of the *personal incapacity* of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is *out of the jurisdiction* of the Court of Chancery or *cannot be found*, or that it is *uncertain which* of several trustees, or which of several devisees of a mortgagee, *was the survivor*, or whether the last trustee, or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate, *without an heir*, or has died and it is *not known who is his heir or devisee*, then in any of such cases the fact that the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation shall be *conclusive evidence* of the matter so alleged in any Court of law or equity upon any question as to the legal validity of the order: Provided always that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or re-assignment of any lands conveyed or assigned by any order under this Act, or a redistribution of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

XLV. And be it enacted, that it shall be lawful for the Lord Chancellor intrusted as aforesaid, or the Court of Chancery, to exercise the powers herein conferred for the purpose of vesting any lands, stock, or *choses en action* in the trustee or trustees of any *charity or society* over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted (a), whether such trustee or trustees

recital in 18 & 19 Vict. c. 134, s. 16, Cons. Ord. xxxv. rule 1, and the practice which had prevailed ever since, it was so doubtful whether there was jurisdiction to make a vesting order in chambers, except in cases provided for by general order, as to render it unsafe to make such orders. See rules of the Supreme Court, Ord. 55, rule 2, as to the applications which may now be made in chambers; and see *Re Moate's Trust*, 22 Ch. D. 635. But where the matter has in the first instance been brought before the Court upon petition, it is competent to the judge who hears it to mould his order so as to direct the disposal in chambers of any of the questions

arising on the petition. The making of a vesting order may thus be referred to chambers, but an order so made in chambers should state so much of the previous order as directed any enquiry preliminary to the vesting order, and as gave liberty to apply in chambers for a vesting order, and should also state the certificate which followed the enquiry; *Re Tweedy*, 28 Ch. D. 529.]

(a) See orders under this section, *Re Norton Folgate*, *Re Basingstoke School*, 1 Set. on Dec. 565, 4th edit. Under 16 & 17 Vict. c. 137, where the value of the property exceeds 30*l.* per annum, any person authorised by the Charity Commissioners may

shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said Court under any statute authorising the said Court to make an order to that effect in a summary way upon petition.

\*XLVI. And be it enacted, that *no lands, stock, or chose en action* vested in any person upon any *trust* or by way of *mortgage*, or any profits thereof, shall *escheat or be forfeited* to her Majesty, her heirs, or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the *attainder or conviction* for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (a).

XLVII. And be it enacted, that nothing contained in this Act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any *beneficial interest therein* of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this Act had not passed (b).

XLVIII. And be it enacted, that where any *infant* or person of *unsound mind* shall be entitled to any *money payable in discharge of any lands, stock, or chose en action* conveyed, assigned, or transferred under the Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privy of the Accountant-General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

XLIX. And be it enacted, that where in any suit commenced or to be commenced in the Court of Chancery it shall be made to appear to the Court by affidavit that diligent search and enquiry has been made

apply to the judge at *chambers* for any order which may be made by such judge, notwithstanding any lunacy; *Re Davenport's Charity*, 4 De G. M. & G. 839; and see p. 852, *supra*.

(a) This section is a re-enactment almost *verbatim* of section 3 of the Escheat and Forfeiture Act, 4 & 5 W.

4, c. 23. See now section 8 of the Extension Act, giving the Court power to appoint new trustees in the place of persons convicted of felony.

(b) This is a re-enactment of sect. 5 of the Escheat and Forfeiture Act. See now 33 & 34 Vict. c. 23.

after any person made a *defendant, who is only a trustee*, to serve him with the process of the Court, and that he *cannot be found*, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been

duly served with the process of the Court, and had appeared and [\*1037] \*filed his answer thereto, and had also appeared by his counsel

and solicitor at the hearing of such cause: Provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid (a).

L. (*This section was repealed by "The Statute Law Revision Act, 1875."*)

LI. And be it enacted, that the Lord Chancellor intrusted as aforesaid, and the Court of Chancery, may order the *costs and expenses* of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper (b).

(a) In *Westhead v. Sale*, 6 W. R. 52, the Court directed the Records and Writ Clerk to certify that the cause was ready for hearing in the absence of a trustee who could not be found.

(b) The prayer as to the costs should not contain the words "incidental to or consequent" upon the application, as they give rise to uncertainty; *Re Fellows's Settlement*, 2 Jur. N. S. 62.

[Costs will not be allowed on the higher scale merely on the ground that the trust funds are large; *Re Spettigue's Trusts*, 32 W. R. 385.]

Where an *infant* trustee was ordered to convey, it was said that the infant was entitled to the same costs as an adult, and the order was made "the other party undertaking to pay such costs as should appear to be reasonably incurred;" *Re Cant*, 10

Ves. 554 (decided under 7 Anne, c. 19).

Where a mortgaged estate has descended to an *infant* heir of the mortgagee, and the mortgagor is asking for a reconveyance on payment of principal and interest, the infant is also entitled to the costs of any enquiry as to the infancy *ultra* the ordinary costs; *Ex parte Ommaney*, 10 Sim. 298; *Miltown v. Trimbleston*, 1 Flan. & K. 338 (decided under 1 Will. 4, c. 60).

If the *lunatic*, against whom an order is sought, be a *trustee*, the trust estate or the *cestui que trust* must bear the costs of the proceedings under the Act, and if he be a *mortgagee*, and it appears upon the face of the mortgage deed that the *lunatic mortgagee* is a trustee for a third party, the costs will fall on the mortgagor; *Re Lewes*, 1 Mac. & G. 23.

\*LII. And be it enacted, that upon any petition being presented under this Act to the Lord Chancellor intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a *commission in the*

But if the mortgagor had no notice of the fact that the lunatic was a trustee, the costs will follow the general rule; *Re Townsend*, 1 Mac. & G. 686; *Re Jones*, 2 Ch. D. 70.

What is the general rule has been much disputed. The latest phase of the law is, that where the lunatic is beneficially interested in the mortgage money, there the costs of the petition, which should be presented by the committee and need not be served on the mortgagor, are (exclusive of the costs of the mortgagor if served) by force of authority and contrary to principle to be borne by the lunatic's estate; *Re Wheeler*, 1 De G. M. & G. 436; *Re Stuart*, 4 De G. & J. 319, and cases cited *Ib.*; *Re Phillips*, 4 L. R. Ch. App. 629; but that in all other cases the costs must be paid by the mortgagor; *Ex parte Clay*, Shelf. Lun. 510, 2d edit., where the mortgage money had not been paid; *Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 De G. F. & J. 554, where the mortgage money had been paid; and see *Re Viall*, 8 De G. M. & G. 439; *Re Rowley's Lunacy*, 1 N. R. 251; *Re Townsend*, 2 Ph. 348, and cases there cited.

[Where a mortgagee became of unsound mind, but was not so found by inquisition, and an order was made on the petition of the mortgagor authorising him to pay the mortgage debt into the Bank of England, and vesting the estate in the petitioner, it was held that the Court had no jurisdiction to make the mortgagee or his estate bear the costs where the application was made by the mortgagor; and no costs were allowed on either side; *Re Sparks*, 6 Ch. D. 361.]

The costs of applications for the appointment of new trustees come out of the *corpus* of the trust fund; *Re Fellows's Settlement*, 2 Jur. N. S. 62;

*Re Fulham*, 15 Jur. 69; *Ex parte Davies*, 16 Jur. 882. And where new trustee of two funds are appointed upon the same petition the costs are borne by the two funds ratably, according to their respective values; *Re Grant's Trusts*, 2 J. & H. 764.

In *Ex parte Davies*, 16 Jur. 882, the Court, though after some hesitation, declared that certain costs incurred under the Act should, with interest at 4 per cent., form a charge on the inheritance.

The Court, on appointing new trustees of real estate, has power under the section to direct the costs to be raised by a mortgage to be settled by the Court; *Re Crabtree*, V.C. Wood, 11 Jan. 1866 (MS.).

Where a petition is presented for vesting the legal estate of the lots sold by the Court in the purchasers, the petition may properly be presented by the purchasers, and the costs of the purchaser of each lot is payable out of the purchase-money of such lot; *Ayles v. Cox*, 17 Beav. 584. See *ante*, p. 1032, note (c).

The Court has no jurisdiction [under this section] to order a person served with the petition to pay the costs personally; *Re Primrose*, 23 Beav. 590. But see the decisions upon the Trustee Relief Act, *Re Woodburn's Will*, 1 De G. & J. 333, and subsequent cases, *ante*, p. 1003. [In *Re Sarah Knight's Will*, 26 Ch. D. 82, Pearson, J., was of opinion that he had jurisdiction under the Rules of the Supreme Court, 1883, Order 65, r. 1, to order a respondent to pay the costs personally, but the decision was reversed on appeal on other grounds, the Court refraining from deciding the point, but Cotton, L. J., expressing a doubt as to the jurisdiction.]

*nature of a writ de lunatico inquirendo* shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission (a).

LIII. And be it enacted, that upon any petition under this Act being presented to the Lord Chancellor intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor, or the said Court of Chancery, to postpone making any order upon such petition *until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose* (b).

[\*1039] \*LIV. And be it enacted, that the powers and authorities given by this Act to the *Court of Chancery* in England shall extend to all *lands and personal estate* within the dominions, plantations, and colonies belonging to her Majesty (*except Scotland*) (a).

LV. And be it enacted, that the powers and authorities given by this Act to the *Court of Chancery* in England shall and may be exercised in like manner and are hereby given and extended to the Court of Chancery in *Ireland* with respect to all *lands and personal estate in Ireland*.

LVI. And be it enacted, that the powers and authorities given by this Act to the *Lord Chancellor* of Great Britain intrusted as aforesaid, shall extend to all *lands and personal estate* within any of the dominions, plantations, and colonies belonging to her Majesty (*except Scotland and Ireland*) (b).

LVII. And be it enacted, that the powers and authorities given by this Act to the *Lord Chancellor* of Great Britain intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to

[(a) A commission will not be directed to issue under this section, where the trustee disputes his insanity, but the inquiry in that case should be under the ordinary proceedings in lunacy. The object of the section is only to give a summary and easy remedy for the removal of the trustee where there is no contest as to the facts, but the Court requires information; *Re Combs*, 51 L. T. N. S. 45.]

(b) Thus where a father purchased in the name of his son, but without intending an advancement, the Court refused to declare the son, who was a lunatic, a trustee for his father without a suit, and directed a suit accordingly; *Collinson v. Collinson*, 3 De G. M. & G. 409; and see *Re Burt*, 9 Hare, 289.

(a) Consequently the *High Court of Justice* here may make a vesting

order as to lands or personal estate in Ireland; *Re Hewitt's Estate*, 6 W. R. 537; *Re Tait's Trusts*, W. N. 1870, p. 257; [*Re Lamotte*, 4 Ch. D. 325; *Re Hodgson*, 11 Ch. D. 888;] or, as to lands in Canada, *Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. N. S. 336.

(b) The *Lord Chancellor of Great Britain*, sitting in *lunacy*, has no jurisdiction over lands in Ireland; *Re Davies*, 3 Mac. & G. 278; [but the Judges of the Court of Appeal who have jurisdiction in Lunacy, having been by special order appointed additional Judges of the Chancery Division for the purposes of applications connected with lunacy can under the two jurisdictions appoint new trustees and make an order vesting lands or personal estate in Ireland; *Re Lamotte*, *ubi supra*; *Re Hodgson*, *ubi supra*.]

the *Lord Chancellor of Ireland* intrusted as aforesaid, with respect to all lands and personal estate in Ireland.

LVIII. And be it enacted, that in citing this Act in other Acts of Parliament, and in legal instruments and in legal proceedings, it shall be sufficient to use the expression "The Trustee Act, 1850."

LIX. And be it enacted, that this Act shall come into operation on the first day of November, one thousand eight hundred and fifty.

1881



## TRUSTEE EXTENSION ACT, 1852.

15 &amp; 16 VICT. CAP. 55.

*An Act to extend the Provisions of the "Trustee Act, 1850."  
(30th June, 1852.)*

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same.

I. That when any *decree or order* shall have been made (a) by any Court of equity directing the sale (b) of any lands for any purpose whatever (c), every person seised or possessed of such land, or entitled to a contingent right therein, being a *party* to the suit or proceeding in which such decree or order shall have been made, and bound thereby (d) or

(a) A decree made *before* the passing of this Act is within the operation of this clause; *Wake v. Wake*, 17 Jur. 545. The decree or order binds only the parties to the suit, and therefore in an administration suit, if the legal estate has descended to the heir of the testator who is not a party, the Court has no jurisdiction to make a vesting order; *Gunson v. Simpson*, 5 L. R. Eq. 332; and see *Gough v. Bage*, W. N. 1871, p. 237; 25 L. T. N. S. 738.

[By 47 & 48 Vict. c. 71 (The Intestates Estates Act, 1884), s. 5, on a sale under that Act of any estate or interest of the Crown, this section is to apply as if such estate or interest were vested in a subject.]

[(b) This section applies to a sale under the Partition Acts; *Beckett v. Sutton*, 19 Ch. D. 646.]

(c) The 29th section of the Trustee Act, 1850, applied only to decrees directing a sale for the payment of

*debts*; and consequently where the decree for sale had been made in order to provide a fund available for the payment of *costs*, the Court had no power to make a vesting order; *Weston v. Filer*, 5 De G. & Sm. 608. This enactment remedies the inconvenience; *Hancox v. Spittle*, 3 Sm. & G. 478. And now in cases falling under this section, a vesting order may be obtained in Chambers; see [Rules of the Supreme Court, Order 55, R. 2, Art. 8. The section applies to the case where the person to convey is not under disability, *per* V. C. Bacon; *Re Lee*, *Kenyon v. Lee*, 1 Set. on Dec. 4th edit. 537; *Beckett v. Sutton*, 19 Ch. D. 646; but see *Strong v. Padmore*, *contra*, 1 Set. on Dec. 4th edit. 537.]

[(d) A devisee of real estate charged with debts who had become a lunatic, and had subsequently by his committee, with the sanction of the Master in Lunacy, commenced an action for the administration of his tes-

\*being *otherwise bound* by such decree or order, shall be deemed [\*1041] to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery (a), if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for *such estate as the Court shall think fit*, either in any *purchaser* (b) or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

II. That sections numbered seventeen and eighteen in the Queen's Printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be *jointly* or *solely* seised or possessed of any *lands* or entitled to a *contingent right* therein upon any *trust*, and a *demand* shall have been made upon such trustee by a person *entitled to require a conveyance or assignment* of such lands, or a duly authorised agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said Court shall be satisfied that such trustee has wilfully refused (c) or neglected to convey or assign the said lands for the space of twenty-eight days after such demand (d), to make an order vesting such lands in such person, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (e).

tator's estate, is bound by an order for sale of the real estate made in the action, and is a trustee within the section; *Re Stamper*, 46 L. T. N. S. 372.]

(a) And the Court of Chancery had jurisdiction even where the party seised or possessed was of unsound mind, but not found lunatic; *Herring v. Clark*, 4 L. R. Ch. App. 167.

(b) As to the persons to present the petition where lands are sold in several lots to different purchasers, see *ante*, p. 1032, note (c); 1038, note.

As to the costs of the petition, see *ante*, p. 1038, note.

(c) A married woman is capable of refusing; *Rowley v. Adams*, 14 Beav. 130.

(d) In *Knight v. Knight*, 14 L. T. N. S. 161, a divorced woman obtained

a vesting order against her late husband.

(e) Under the 17th & 18th sections of the Trustee Act, 1850, the power of the Court arose only upon *written* refusal to convey, or neglect or refusal so to do after tender of a proper deed. The former contingency was of rare occurrence, and considerable difficulty was often experienced in bringing the case within the terms of the latter. In copyholds, for instance, vested in a *feme covert*, who could only surrender with consent of the husband, and on being privately examined, how could a proper deed be tendered? See *Rowley v. Adams*, 14 Beav. 130.

Where a mortgagor covenanted to surrender copyholds to the mortgagee, and refused to surrender for twenty-

III. That when any *infant* shall be *solely* entitled to any *stock* [\*1042] upon *any trust*, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof (*a*); and when any infant shall be entitled *jointly* with any other person or persons to any *stock* upon any *trust*, it shall be lawful for the said Court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons conjointly entitled with the infant, or in him or them together with any other person or persons the said Court may appoint (*b*).

IV. That where *any person* shall neglect or refuse to *transfer* any *stock* or to receive the dividends or income thereof, or to *sue for* or recover any *chose en action*, or any interest in respect thereof, for the space of *twenty-eight days* next after an *order* of the Court of Chancery for that purpose shall have been served upon him (*c*), it shall be lawful for the Court of Chancery to *make an order* (*d*) vesting all the right of such person to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such *chose en action*, or any interest

eight days, the Court made a vesting order, and service on the mortgagor, who could not be found, was dispensed with; *Re Crowe's Mortgage*, 13 L. R. Eq. 26.

(*a*) An order was once made by mistake under this Act, where the infant was entitled beneficially; *Re Westwood*, 6 N. R. 61; but the order was afterwards corrected, and made under the proper Act, viz., 1 W. 4, c. 65, s. 32; *Re Westwood*, 6 N. R. 316.

Agents of executors invested a sum of stock in the names of infants, who had an interest under the will, instead of in the names of the executors, and the Court made a vesting order for the transfer into the names of the executors; *Rives v. Rives*, W. N. 1866, p. 144; 14 L. T. N. S. 351. So where executors had invested stock in the names of themselves and an infant, and the infant was the survivor; *Gardner v. Cowles*, 3 Ch. D. 304.

Where stock was standing in the names of three trustees and (*lege for*) an infant, and two of the trustees were dead and the third was out of the jurisdiction, the Court appointed a guardian, and allowed maintenance,

and vested the right to receive the dividends in the guardian during the infant's minority; *Re Morgan*, 1 Set. on Dec. 516, 4th edit.

(*b*) In *Cramer v. Cramer*, 5 De G. & Sm. 312, Vice-Chancellor Parker held that, the Trustee Act, 1850, having conferred no general power in the case of an infant trustee of stock *within the jurisdiction*, the Court had no authority to make a vesting order with regard to stock held by an infant trustee *out of the jurisdiction*. Hence this clause; see *Sanders v. Homer*, 25 Beav. 467.

[The section applies to the case of stock to which an infant is beneficially entitled standing in the joint names of the infant and another person; *Re Harwood*, 20 Ch. D. 536.]

(*c*) In *Mackenzie v. Mackenzie*, 5 De G. & Sm. 338, it was held that the case of a person refusing to transfer stock in obedience to an *order* of the Court, was not provided for in the Trustee Act, 1850. Hence the present remedial enactment.

(*d*) The order under this section need not be made upon a petition, but may be made upon *motion*; *Re Holbrook's Will*, 5 Jur. N. S. 1333.

in respect thereof, in such person or persons as the said Court may appoint.

V. When any stock shall be standing in the sole name of a deceased person, and his *personal representative shall refuse or neglect* to transfer such stock or receive the dividends or income thereof for the space of *twenty-eight days* next after an order of the Court of Chancery for that \*purpose shall have been served upon him, it shall be [\*1043] lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said Court may appoint (a).

VI. When any order being or purporting to be under this Act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly (b): and the person or persons so appointed shall be authorised and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order, and the *Bank of England, and all companies and associations* whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

VII. That every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete *indemnity* to the Bank of England, and

(a) It is the practice of the Bank of England not to allow the dividend to be split into fractional parts; *Skynner v. Pelichet*, 9 W. R. 191.

(b) In *Re Smyth's Settlement*, 4 De G. & Sm. 499, it was held that, under the 35th section (which differed in this respect from the 26th section) of the Trustee Act, 1850, the Court had no power to vest "the right to the stock," but only "the right to call for a transfer of the stock," and that the Bank was justified in refusing to transfer stock to new trustees under an order vesting in them "the right

to the stock." Hence this enactment, which directs the Bank to obey all orders vesting the right to stock or the right to call for a transfer of it. [Where the trustees appointed by a testator died and new trustees were appointed in their place, and all the trust property was vested in the new trustees, the Bank declined to act unless the order directed the new trustees to transfer the stock into their own names; *Re Glanville's Trusts*, W. N. 1877, p. 248; 1878, p. 21.]

all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association or person, to enquire concerning the propriety of such order, or whether the Lord Chancellor intrusted as aforesaid, or the Court of Chancery had jurisdiction to make the same.

VIII. That when any person is or shall be *jointly or solely* seised or possessed of any *lands* or entitled to any *stock*, upon any *trust*, [\*1044] and such \*person has been or shall be convicted of *felony*, it shall be lawful for the Court of Chancery, upon proof of such conviction, to *appoint any person to be a trustee* in the place of such convict, and to make an *order for vesting* such lands, or the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability and had duly executed a conveyance or assignment of his estate and interest in the same.

IX. That in all cases where it shall be expedient to appoint a *new* trustee, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be *any existing trustee or not* at the time of making such order (a).

X. In every case in which the Lord Chancellor intrusted as aforesaid (b) has jurisdiction under this Act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to *make an order appointing a new trustee or new trustees*, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in *Chancery* as well as in *Lunacy*, or be passed and entered by the Registrar of the Court of Chancery (c).

(a) See note, p. 1029, *supra*, as to the doubt which led to this enactment. See an order under this section, *Davis v. Chanter*, 4 Jur. N. S. 272. It has been doubted whether the Court has jurisdiction to appoint trustees of personalty where none were appointed by the testator, but the Court has authority to do it by its inherent jurisdiction independently of the Act; *Dodkin v. Brunt*, 6 L. R. Eq. 580. [And it has since been held that the executor or heir must be deemed a constructive trustee so as to give the Court jurisdiction to appoint trustees under the Act; *Re Davis's Trusts*, 12

L. R. Eq. 214; *Re Moore*, 21 Ch. D. 778, and see *Re Smirthwaite's Trusts*, 11 L. R. Eq. 251; *Re Gillett's Trusts*, 25 W. R. 23.

The Court sitting in Lunacy and in Chancery has power under this section to appoint new trustees of the will of a deceased lunatic, where the trustees appointed by the lunatic have died in his lifetime, for the purpose of getting rid of the funds standing in Court to the credit of the lunacy; *Re Orde*, 24 Ch. D. 271.]

(b) See Trustee Act, 1850, s. 3, and *ante*, p. 1013.

(c) Where four trustees had been

XI. That all the jurisdiction conferred by this Act (*d*) on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of Lunatics, shall and may be had, exercised, \* and performed by the person or persons for the time [\*1045] being intrusted as aforesaid.

XII. That this Act shall be read and construed according to the definitions and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned Act (except so far as the same are altered by or inconsistent with this Act) shall extend and apply to the cases provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Trustee Act, 1850.

XIII. That every order to be made under the Trustee Act, 1850, or this Act, which shall have the effect of a conveyance or assignment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty.

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The 28 & 29 Vict. c. 99, has since been passed, by which it is enacted, by section 1, article 5, that, "in all proceedings under the Trustee Acts, or any of such Acts, in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the sum of 500*l.*," the County Courts "shall have the power and authority of the High Court of Chancery."

appointed, and three died and the fourth was a lunatic, a petition for the appointment of four new trustees was held to be properly intituled under this section in Lunacy only; *Re Owen*, 4 L. R. Ch. App. 782; *Re Mason*, 10 L. R. Ch. App. 273; see Trustee Act, 1850, s. 32, and *ante*, p. 1013, note (*e*).

(*d*) See *Re Waugh's Trust*, 2 De G. M. & G. 279; *Re Pattinson*, 21 L.

J. N. S. Ch. 280. The doubts there raised as to the jurisdiction of the Lords Justices under the Trustee Act, 1850, were removed by 15 & 16 Vict. c. 87, s. 15 (date of Royal Assent 1 July, 1852), and therefore after the Trustee Extension Act, to which the Royal Assent was given on 30 June, 1852. See *ante*, p. 1013, note (*e*).

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